The Death Penalty in Ohio: Fairness, Reliability, and Justice at Risk—A Report on Reforms in Ohio's Use of the Death Penalty Since the 1997 Ohio State Bar Association Recommendations Were Made

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In 1997, the Ohio State Bar Association (OSBA) identified systemic problems in the structure and application of Ohio's death penalty charging and sentencing scheme. It called for the review of each capital case before carrying out the death sentence. In addition, a number of recommendations for statutory and judicial reforms were made. To date, the individual case review called for has not taken place. Three death row prisoners have been executed—Wilford Berry on February 19, 1999, Jay D. Scott on June 14, 2001, and John W. Byrd, Jr. on February 19, 2002. In each of these cases substantial questions arose from the same concerns as those expressed in the OSBA's 1997 report. In Ohio, at this writing, 120 capital cases are on review in the federal courts. Each of these death sentences was obtained under the system criticized by the OSBA. Eighty more cases are on review in the state courts of Ohio. Seventy-five persons are awaiting trial on capital indictments. All of these cases, all of these persons, have been and are being subjected to the same procedures that raised concerns in 1997.

Nationally, the movement for a moratorium on the use of the death penalty for reasons similar to those noted by the OSBA has gained momentum. The American Bar Association called for a moratorium on February 3, 1997. Since then, a number of bar associations and jurisdictions around the nation have joined the moratorium movement.[1]

The Ohio State Bar Association opted not to call for a moratorium but instead to require individual case review and systemic change in Ohio's death penalty

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[1] The significant progress of moratoria measures among the states is well-charted in Professor James Liebman's article, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315 (2002).

charging and sentencing scheme on the theory that the close scrutiny of each case would prevent any unjust execution and that systemic improvements would protect future cases from the same errors or unfairness. That call, as yet, has not been heeded. This is not to say that nothing has changed in the intervening years—small changes have been wrought—some for good, some for ill.

What follows is the report as presented to the Ohio State Bar Association Council of Delegates in 1997,[2] *the OSBA's recommendations and, where there have been changes in the law since that time, updates reflecting those changes. New information is noted at the conclusion of each section of the report immediately following the OSBA recommendation for that section.*

I. INTRODUCTION

When the people of the State of Ohio gave the government the power to impose punishment for criminal conduct, it was with the clear understanding that punishment would be meted out fairly and only after objective, pre-defined procedures were applied in a consistent and even-handed fashion. Ohio's use of the death penalty does not meet those standards. This situation is not unique to Ohio. An inability to establish death penalty trial and sentencing procedures that result in reliable guilt and sentencing decisions is seen around the country. Recently, the American Bar Association has called for eliminating the use of the death penalty until these problems are corrected.[3] The Ohio State Bar Association should take the same action.

A. *What Is a Reliable Guilt and Sentencing Determination?*

A reliable determination that a person is guilty of a capital crime is one in which (1) impartial triers of fact[4] (2) are presented with all of the admissible

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[2] The report's title was "*Ohio's Death Penalty Processes Fail To Guarantee Reliable, Consistent, and Fair Capital Sentences. Execution Should Not Go Forward in Any Individual's Case Unless and Until it Can Be Objectively Determined That the Defects in Ohio's Death Penalty System Did Not Contribute To the Conviction or Death Sentence.*" It presents the position of the Ohio State Bar Association adopted by the Council of Delegates on November 8, 1997, in Columbus, Ohio. It was presented to the Council by the Criminal Law Justice Committee in a report adopted by majority vote on June 5, 1997, and was prepared from a memorandum to that committee written by S. Adele Shank. That memorandum was expanded to include suggestions and recommendations from members of the Criminal Law Justice Committee and was again reviewed and adopted at the meeting held September 27, 1997. Drafting sub-committee: S. Adele Shank, chair, Professor Margery Malkin Koosed, and Harry Robert Reinhart. Professor Koosed contributed Parts IV.B.2. and IV.F.1–2. Harry Reinhart contributed Part IV.D.1. All contributed to the final review and editing.

[3] *Report with Recommendations No. 107*, 1997 A.B.A. Sec. Individual Rts. & Resp. 12, *at* http://www.abanet.org/irr/rec107.html (last visited Jan. 14, 2002).

[4] *See* Swain v. Alabama, 380 U.S. 202, 211, 219–20 (1965).

evidence in favor of guilt and innocence,[5] and (3) that evidence clearly established guilt by "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs."[6] In other words, each juror should be as convinced of guilt as he or she would have to be of the validity of a dangerous medical procedure proposed for use on his or her child in a life or death situation. If the facts before the jury would not enable them to make a decision in favor of the medical procedure, proof beyond a reasonable doubt has not been met. Each of these reliability factors should be objectively identifiable on review.

A reliable determination that death is the appropriate sentence is made when (1) proof of guilt is beyond a reasonable doubt; (2) all mitigating evidence has been properly presented;[7] (3) the jury is properly instructed and has a full and accurate sense of their responsibility in the sentencing process;[8] and (4) the balance between the aggravating factors that make the case death-eligible and the mitigating factors that weigh in favor of life,[9] beyond a reasonable doubt, weighs in favor of death. Each of these factors should be objectively identifiable on review.

Ohio's capital sentencing system is unreliable. There are systemic failures of justice in both the guilt and penalty determinations. As a result, death penalty law is subject to constant tinkering by the courts and legislature. It suffers from nearly every defect noted by the American Bar Association in its call for a national halt to the use of the death penalty and more.

B. *The Need for Review of Ohio's Death Penalty System.*

The Ohio State Bar Association now seeks review of Ohio's death penalty trial and sentencing processes that have failed to provide reliability in rendering capital sentences and the cases in which they were used. Some of the problems created by those processes can be addressed with new sentencing proceedings. Some may require new trials and some may require nothing more than a hearing or new review of the existing record.

This is not a call for the abolition of the use of capital punishment or for a halt to capital prosecutions. It is, rather, an effort to ensure that no person's life is unfairly taken in the name of the State of Ohio. Review of Ohio's death penalty system and the existing capital cases will ensure that every capital sentence carried out is a just reflection of the democratic values of our state and country

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[5] *See* United States v. Agurs, 427 U.S. 97, 108–12 (1976) (explaining what evidence must be produced to meet due process standards); Brady v. Maryland, 373 U.S. 83, 89 (1967).

[6] 4 OHIO JURY INSTRUCTIONS § 403.50 (Anderson 2000); *see* OHIO REV. CODE ANN. § 2901.05(D) (Anderson 2001); In re Winship, 397 U.S. 358, 363–64 (1970).

[7] *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978).

[8] *See* Caldwell v. Mississippi, 472 U.S. 320, 329–30 (1985).

[9] OHIO REV. CODE ANN. § 2929.03(D)(1) (Anderson 2001).

and will allow us to change those that are not. This does not in any way deny the fundamental integrity of our legal system or those who work within it, but rather allows the system to live up to its own standards by correcting errors that might otherwise not be addressed before lives are wrongly taken. Taking a step back to study a situation is a bow to good sense and even-handed justice. No one is hurt when justice is served. All are damaged when justice is denied to even one condemned prisoner.

The following is an overview of the major problems present in Ohio's capital sentencing system. It is not an exhaustive discussion but rather highlights significant defects that contribute to an overall absence of fairness and due process in death penalty cases. These problems make the system unreliable, arbitrary, capricious, and cruel.

II. OHIO'S COMPLEX DEATH PENALTY PROCESS

Sadly, there are still attorneys and judges who say that a capital case is no different than an "ordinary" felony—only that the possible penalty is greater. This simplistic view of the state's use of the ultimate penalty known to humankind is unfortunately shared by many members of the public and contributes greatly to the false perception that capital cases are fraught with unnecessary delay. In fact, many capital cases are pushed through the legal system at a pace and under circumstances that make it difficult for even experts in capital litigation to provide effective assistance. Capital litigation is complex, time consuming, and intellectually and emotionally demanding legal work. The failure to understand this underlies many of the defects in Ohio's capital sentencing system, including the underfunding of indigent defense and the imposition of unreasonably short time limits at various points in the legal process.

Experts around the country report that an average capital defense at the trial level, done reasonably well, requires between 400 and 1,500 hours of attorney time.[10] Capital cases also significantly increase the expenditure of court time as

[10] *See, e.g.*, Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495, 516–17 (1996); Anthony J. Marabella, Jr., *The Garden Variety Capital Case: But is the Garden Really a Jungle of the Unexpected?*, 44 LA. B.J. 228, 229 (1996) (stating that the private counsel fee for the work and hours involved in a capital case would exceed $100,000 and further noting that the author spent *over* 1,000 hours and made twenty trips to the Louisiana Supreme Court and the federal courts in defending an average capital case); Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 311 (1991) (detailing how two trial counsel spent a total of 1,341 hours preparing and presenting a case and that each attorney was paid $2,000); Douglas W. Vick, *Poorhouse Justice: Under Funded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 336–37 (1995) (stating that "in a typical death penalty case, a defense attorney who takes the procedural steps and pursues the defenses contemplated by the [United States Supreme] Court's modern Eighth Amendment jurisprudence can expect to

compared to non-capital trials.[11] If any difference exists between Ohio's capital sentencing scheme[12] and those in other states, it is that Ohio has devised a more complex death penalty structure that requires an even greater attention to detail and thus more time.

A. *The Bifurcated Trial*

Capital cases, in Ohio and throughout the country, are handled through a bifurcated trial process in which innocence or guilt is determined in the first stage and, assuming a guilty verdict, penalty is determined in the second stage. This bifurcated system alone, while constitutionally mandated,[13] makes capital trials more difficult to prepare than even a non-capital murder case. Defense counsel must plan for two separate proceedings—a defense on guilt and a mitigation strategy should the defense fail.

This bifurcated process significantly impacts jury selection. It necessarily includes a process known as death qualification that excludes from jury service all those whose moral qualms about the death penalty preclude them from voting for a capital sentence.[14] This part of the voir dire process is routinely done with each juror individually, in order to allow the potential juror to freely express his or her private thoughts and to avoid having the juror's qualms or, sometimes, religious arguments sway the other jurors. Although time consuming, this aspect of voir dire is as important to the judge and prosecutor as it is to the defendant. A single juror tainted by bias requires reversal of the case should there be a conviction.

The bifurcated trial uses the same jury for the guilt/innocence determination and the penalty decision. This requires defense counsel to know on the day voir dire begins what his or her mitigation strategy will be. The jurors must be able to fairly consider all evidence that weighs against a capital sentence should the case proceed to a penalty determination. Effective voir dire must address this issue. Because counsel must be prepared before trial for a penalty phase that may not take place, the pre-trial preparation for a capital case is necessarily more time consuming than for a non-capital felony case.

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expend at least 1,900 attorney hours to defend his or her client's case through direct appeal"); Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1258–63 (1985); Stephanie Saul, *When Death is the Penalty: Attorneys for Poor Defendants Often Lack Experience and Skill*, NEWSDAY, Nov. 25, 1991, at 8 (noting that experts interviewed stated that a capital trial requires between 400 and 1,000 hours of attorney time).

[11] Garey, *supra* note 10, at 1258. Garey found that capital trials take thirty days more trial time than non-capital murder trials. *Id.*

[12] OHIO REV. CODE ANN. §§ 2929.03–04 (Anderson 2001).

[13] *See* Gregg v. Georgia, 428 U.S. 153, 191–192 (1976).

[14] *See* OHIO REV. CODE ANN. § 2945.25(C) (Anderson 2001); Wainwright v. Witt, 469 U.S. 412, 424–25 (1984).

Publicity is frequently an issue in capital cases. That, too, contributes to the complexity of proceedings. Often hearings are held to determine if and to what extent media coverage will be allowed. These can place a great burden on the court.[15] Rarely does publicity become an issue in non-capital felony cases. When pre-trial publicity is extensive, it impacts the length of the voir dire process. Veniremen must be questioned privately about such matters in order not to spread media accounts to the entire pool of potential jurors. While critical to insuring that the jury is impartial, this process greatly increases the in-court time spent by the judge, prosecutor, and defense counsel.

The bifurcated trial also increases the volume of motion practice in capital cases. Issues of all sorts must be addressed for both phases of trial—from the use of confessions and statements made in the course of psychiatric examinations, through the legality of jail house snitch testimony, to the granting and denying of prosecutorial immunity in order to shape the trial testimony, requests for experts, and constitutional challenges—before trial begins.[16]

Jury instructions must be analyzed and drafted for two proceedings. Ohio standards for proper instructions have changed repeatedly. Counsel who is not familiar with capital jury issues will inevitably fail to preserve his client's rights. The Ohio Supreme Court has held that several often given instructions are improper in capital cases but, rather than placing the burden on the courts to instruct properly, the Court finds the errors waived when trial counsel fails to object.

In addition to increased preparation of pleadings and in-court work that falls on all participants, capital litigation requires increased investigation, which must be done by the defense. Counsel must investigate the prosecution's guilt phase case and investigate his client's life and mental health for mitigation. When a client presents mental health issues that may provide a defense, the equation for the investigation and presentation of evidence is extremely complex.

B. *Mental Health Issues*

The decision to investigate a guilt/innocence phase insanity defense requires thorough knowledge of the state and federal law surrounding the use of the client's statements made in the course of the examination and the use of psychiatric and/or psychological testimony.

Statements made in the course of a court ordered examination to determine sanity at the time of the offense under Ohio Revised Code section 2945.39 are given to the state.[17] Statements made in the course of such examinations may not

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[15] *See generally* Sheppard v. Maxwell, 384 U.S. 333 (1966).

[16] It is not unusual for fifty or more motions to be filed in a capital case.

[17] These statements may not be used in the guilt phase of trial, but there is no statutory limitation on their use by the state in the penalty phase. OHIO REV. CODE ANN. § 2945.371(J) (Anderson 2001).

be used against the client in the guilt or sentencing phase of trial unless he/she was warned of the possibility.[18] The validity of the warning is questionable when the client is determined not to be insane but may still be incompetent to waive his rights. The client's competence to waive Fifth Amendment rights may have to be separately litigated if the state tries to use the statements.

Mental health issues are frequently a part of capital litigation even when an insanity defense is not involved. Counsel who fails to investigate mental health issues provides ineffective assistance in a capital case.[19] Counsel must be familiar with constitutional and statutory standards for determining competence to stand trial,[20] competence to waive rights,[21] and competence to be executed.[22] Counsel and the court must know the circumstances under which a hearing on competency is required[23] and the limits on the use of the client's statements made during competency examinations.[24]

Entirely different mental health issues govern the penalty phase of trial. What is inadmissible as a defense in the guilt/innocence phase can be the crux of the penalty phase mitigation. Ohio does not recognize the irresistible impulse defense,[25] yet this can be presented in mitigation, as can evidence of any mental disease or defect.[26] Obtaining the expert assistance necessary to present such mitigation can be tricky. A request for a pre-sentence investigation and accompanying mental health evaluation under Ohio Revised Code section 2929.03(D)(1) results in the turning over to the state and the jury the report of the evaluation and the defendant's statements made therein, regardless of the defendant's wishes or any irrelevant, inaccurate, or prejudicial information contained in the report. To avoid this result, defense counsel must use the provisions of Ohio Revised Code section 2929.024 and the United States

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[18] *See* Satterwhite v. Texas, 486 U.S. 249 (1988) (noting that statements may not be introduced in the penalty phase of the trial); Estelle v. Smith, 451 U.S. 454, 462 (1981) ("Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument of his own conviction,' it protects him as well from being the 'deluded instrument' of his own execution.") (internal citation omitted). Ohio law only protects the defendant from use of his statements in the guilt phase of trial. OHIO REV. CODE ANN. § 2945.371(J) (Anderson 2001).

[19] Glenn v. Tate, 71 F.3d 1204, 1211 (6th Cir. 1995).

[20] *See* OHIO REV. CODE ANN. §§ 2945.37–2945.371 (Anderson 2001); Dusky v. United States, 362 U.S. 402, 402 (1960) (explaining the test for determining competence to stand trial).

[21] *See* Godinez v. Moran, 509 U.S. 389, 400 (1993); Boykin v. Alabama, 395 U.S. 238, 242–43 (1969); Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938).

[22] *See* OHIO REV. CODE ANN. § 2949.28 (Anderson 2001); Ford v. Wainwright, 477 U.S. 399, 416–18 (1986); State v. Scott, 748 N.E.2d 11, 13–14 (Ohio 2001).

[23] *See* OHIO REV. CODE ANN. § 2945.37(B) (Anderson 2001); Drope v. Missouri, 420 U.S. 162, 173, 180–81 (1975); Pate v. Robinson, 383 U.S. 375, 384–86 (1966); State v. Berry, 650 N.E.2d 433, 439–40 (Ohio 1995); State v. Rahman, 492 N.E.2d 401, 410–11 (Ohio 1986).

[24] *See* Estelle v. Smith, 451 U.S. 454, 462–71 (1981).

[25] *See* OHIO REV. CODE ANN. §§ 2945.391, 2901.01(14) (Anderson 2001).

[26] *See* OHIO REV. CODE ANN. § 2929.04(B)(3) (Anderson 2001); *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1978).

Supreme Court ruling in *Ake v. Oklahoma*[27] to obtain the necessary evaluations without revealing the nature of counsel's mitigation investigation to the state and without being required to reveal the client's statements if the evaluation is not going to be used at trial.

C. *Appellate Practice*

Appellate practice is complex and burdensome in capital cases. Just as the trial is longer and more complex in capital cases, so too is the record upon which appellate review is based. It is unusual for a capital trial record to be fewer than 3,000 pages in length. Many are longer. Arguable issues often number in multiples of ten. Although in all other areas of the law appellate counsel is well advised to "winnow" the issues to the few most likely to succeed, in capital cases this is not possible for a number of reasons.

First, any issue not raised is waived.[28] Second, because capital cases take many years to litigate, what looks at the time of writing the first brief to be an unlikely ground for relief may in several years be the basis for reversal.[29] Third, new rules limiting the opportunity for relief based on legitimate but previously unraised claims make "winnowing" out an issue a fatal mistake. Coupled with Ohio's elimination of review of capital cases by the county courts of appeals[30] and the short time limit for filing the appellate brief,[31] these factors make capital appellate work a treacherous, high-speed navigation through complex legal issues and procedural rules with the burden of the client's life resting on counsel's shoulders. It also increases the work of the prosecutor, who must answer the defendant's brief, and the judges, who must review it all as well as the record.[32]

D. *Stays*

The constant need to obtain and keep in effect stays of execution is an additional complexity that does not impact other criminal cases. It requires defense counsel to pursue stays, the state to repeatedly decide whether to oppose them, and the court to handle the repeated motions. Recent changes in the law regarding stays make their availability uncertain and add to the stress of capital litigation at all levels.[33]

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[27] 470 U.S. 68, 78–84 (1985).

[28] State v. Perry, 226 N.E.2d 104, 106, 108 (Ohio 1967).

[29] *See* Cage v. Louisiana, 498 U.S. 39, 40–41 (1990); Hitchcock v. Dugger, 481 U.S. 393, 398–99 (1987).

[30] *See* OHIO CONST., art. IV, § 2.

[31] *See* OHIO SUP. CT. R. VI.

[32] OHIO REV. CODE ANN. § 2929.05(A) (Anderson 2001).

[33] *See* OHIO REV. CODE ANN. §§ 2953.09–10, 2953.21(H) (Anderson 2001); *see also infra* Part VII.

E. *State Post-Conviction and Federal Habeas Corpus*

Counsel must constantly heed filing deadlines for state post-conviction petitions and federal habeas corpus relief, as well as the standards for preserving issues for review in those proceedings. Failure to make the proper record at trial can foreclose review of an issue forever. Similarly, failure to obtain a full and complete record on appeal or failure to raise all issues cuts off future review of many claims no matter how egregious the injustice that results.

Capital litigation throughout the legal system is complex and requires specialized knowledge and experience. The complexity is systemic and impacts the court, the prosecution, and the defense. Litigating under the constant pressure to speed up trials and executions puts all those involved at risk for making mistakes. Understanding the complexity of this system is the foundation upon which the specific issues discussed below must be addressed.

III. UNDERFUNDING INDIGENT CAPITAL DEFENSE

Capital litigation is expensive and time consuming. While the court and prosecutor are salaried state officials with paid staffs and no overhead, the appointed defense attorney is financially on his or her own. Although the indigent capital defendant is entitled to counsel,[34] the State has failed to provide adequate compensation for appointed attorneys. The maximum any county will pay two attorneys for trial level representation is a total of $40,000.[35] Only thirty counties actually pay this sum. Most pay under $25,000. Ten counties pay $10,000 or less.[36] In some cases extraordinary fees are allowed. Even then counsel works for weeks or months not knowing if, whether, when, or how much he or she will be paid because most courts make this decision only after the proceedings are completed. Generally, however, the fees paid appointed counsel do not adequately compensate for the work that must be done.

In Ohio, the maximum hourly rate for capital representation of the indigent is $50. Some counties pay as little as $25. This will not cover the hourly overhead for most law offices.[37] Even in the most impoverished areas of the state, private

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[34] OHIO REV. CODE ANN. § 2953.21(I)(1) (Anderson 2001).

[35] The Ohio Public Defender Commission sets the maximum allowable fees for state reimbursement of indigent defense costs. *See* OHIO REV. CODE ANN. §120.04(B)(7)(8)(9) (Anderson 2001) (granting authority to the Ohio Public Defender to set these maximum fees, which are on file with the author). Individual counties determine what they are willing to pay for representation of indigent defendants. Few meet the Ohio Public Defender maximum.

[36] *See* OFFICE OF THE OHIO PUBLIC DEFENDER, COUNTY FEE SCHEDULE FOR APPOINTED COUNSEL IN DEATH PENALTY TRIALS (1997) (on file with author).

[37] Most law offices have an hourly overhead greater than this fee. Any lawyer working for this rate loses money. Depending on the region of the state, the average Ohio attorney had an hourly overhead of $17.27 to $23.00 in 1994, based on 2,000 billable hours per year. THE OHIO ST. BAR ASS'N, THE 1994 DESKTOP REFERENCE ON THE ECONOMICS OF LAW PRACTICE IN

counsel command a higher rate of pay for even the simplest legal work. Coupled with the very low fee maximums, attorneys who accept capital appointments are faced with the choice of working without compensation or not doing all the work that is necessary.

There is a similar deficit in the funds provided for defense experts. Ohio Revised Code section 2929.024 requires that defense investigators and experts be paid by the state.[38] Few indigent defendants are allowed the amount of money they request. None are provided funds adequate to match the resources of the prosecution. An indigent defendant who obtains $15,000 to prepare his case—trial and mitigation—is both rare and lucky.

On the other hand, the prosecution has the prosecutor's office with staff, often including investigators. The prosecutor also has access to local law enforcement agencies, the coroner's office and forensic services, state forensic psychiatric services, the Ohio State Highway Patrol, the Ohio Bureau of Criminal Identification and Investigation, FBI assistance in forensics and sometimes investigation, and a national, computerized data base of information on criminals, license numbers, fingerprints, and soon, DNA.[39] In addition, the Ohio Attorney General has created a death penalty unit of lawyers who go around the state helping local prosecutors secure death sentences and hold onto them in the appellate and post-conviction process. All of these services are available to the state in every case. The value of these services far exceeds the amount of money and/or services available to the indigent defendant even in extraordinary cases.

In a capital case, as noted above, the defense not only has to prepare for the guilt/innocence phase of trial but also must prepare for the sentencing phase. At a minimum this requires the assistance of a social worker/mitigation specialist and a psychologist. It often requires neurological testing. Guilt phase preparation usually requires the aid of an investigator and one or more scientific experts—fingerprint, DNA, blood-splatter, ballistics, handwriting, and others.

In most instances, the defense is not given enough money to thoroughly investigate both the trial and sentencing issues in a capital case. Judges are hesitant to spend money for experts when the defense wants to check the accuracy of the state's forensic experts or when counsel cannot tell in advance what evidence may be generated from the expert's participation. No indigent defendant has been provided enough funds for experts and investigators to level the playing field. Indigent defendants are always outmatched in overall resources by the prosecution. This leaves the defendant unable to challenge or present scientific or other expert evidence that might change the outcome of the case.

OHIO, Exhibit 22; *see also* Paduano & Smith, *supra* note 10, at 312 (noting that overhead for a modest law office is $25 to $35 per hour).

[38] OHIO REV. CODE ANN. § 2929.024 (Anderson 2001).

[39] OHIO REV. CODE ANN. § 109.573 (Anderson 2001).

It is widely recognized that the money provided for the defense of indigent capital defendants is inadequate. This problem occurs around the country.[40] Even relatively minor legal matters require more money than is often provided for a capital defense. In October 1994, Ohio Governor George Voinovich was charged with a misdemeanor for ordering his plane to leave the ground while President Clinton's plane, Air Force One, was preparing for takeoff.[41] The Governor's order was on tape and accounts of the story or the order were played on various broadcast media.[42] While it seemed there was little to dispute, Attorney General Betty Montgomery set aside $20,000 for Governor Voinovich's misdemeanor defense.[43] In some counties this is more than a capital defendant is given for his entire case. In the best of circumstances, a capital defendant in Ohio is lucky to get twice that amount to defend a vastly more complicated felony charge *and* prepare mitigation.

The same problems with counsel fees for indigent defendants exist at every level of the state system. Although capital trials often result in transcripts of several thousand pages, with one exception, no county pays more than $10,000 for a capital appeal.[44] Some pay as little as $2,000. Post-conviction defense fees are even lower. Franklin County pays only $150 for a capital post-conviction defense.[45] Most lawyers cannot drive to the courthouse to pick up the transcript for that amount of money.

Recommendation

The Ohio State Bar Association has for many years advocated adequate payment of appointed counsel fees. Consistent with that longstanding policy, it is recommended that Ohio create a statewide fee schedule for paying appointed counsel that reflects the economic realities of capital litigation. According to exhibit twenty of the Ohio State Bar Association's *1994 Desktop Reference on the Economics of Law Practice in Ohio*, the median hourly billing rate for attorneys with three years of experience was $95 per hour in 1994. This should be the hourly rate paid appointed counsel in all counties and should be adjusted

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[40] *Cf.* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Vick, *supra* note 10.

[41] Alan Johnson, *Governor's FAA Appeal to be Costly: Taxpayers to Pay up to $20,000 for His Legal Fees*, COLUMBUS DISPATCH (Ohio), June 5, 1996, at A1.

[42] *Id.*

[43] After much public criticism, Governor Voinovich decided to pay for his defense from Republican Party funds or his own pocket. Lee Leonard, *Taxpayers Off Hook for Fine; Voinovich Alters FAA Flight Plan*, COLUMBUS DISPATCH (Ohio), June 15, 1996, at A1.

[44] *See* OFFICE OF THE OHIO PUBLIC DEFENDER, COUNTY FEE SCHEDULE FOR PAYMENT OF APPOINTED COUNSEL IN DEATH PENALTY APPEALS: COURT OF APPEALS AND OHIO SUPREME COURT (1997) (on file with author).

[45] *See* OFFICE OF THE OHIO PUBLIC DEFENDER, COUNTY FEE SCHEDULE FOR PAYMENT OF APPOINTED COUNSEL IN DEATH PENALTY POST CONVICTION CASES (1997) (on file with author).

every five years for inflation and increased costs. The budget for each capital case should be $75,000, which includes attorney and expert fees. Appellate and post-conviction work is of equal value and importance. Attorney fees for both should be paid at the same hourly rate. The budget for a capital appeal should be $40,000. The capital post-conviction budget should be the same as at trial. The courts should have authority to increase these amounts when the circumstances of the case call for it.

Update

The underfunding of indigent capital defense remains a critical problem in Ohio. On January 1, 2000, the Ohio Public Defender Commission revised its reimbursement schedules for appointed counsel in capital cases to allow a maximum hourly rate of $50 for out-of-court time and $60 for in-court time, with a total maximum fee for each of two attorneys of $25,000 or a total of $50,000.[46] Even so, many counties do not authorize payment of fees at these rates but continue to set lower hourly rates for appointed counsel. Fees currently range from $35 to $60 per hour.[47] At the same time, the median hourly rates for attorneys with three years of experience have increased to $110 per hour.[48] The prosecution continues to have vastly superior resources and access to resources throughout the litigation process.

IV. SYSTEMIC FACTORS THAT DIMINISH THE FAIRNESS AND RELIABILITY OF THE DEATH PENALTY

A. *Charging Decisions*

Questions have been repeatedly raised about how prosecuting attorneys decide whether to seek the death penalty from county to county. It is alleged, in particular, that prosecutors in some counties charge capital specifications in obviously non-capital cases, in order to coerce pleas to lesser crimes and thus avoid the time and expense of trials. It is claimed that prosecutors in other counties seek indictment on death specifications in every case where the facts arguably allow it and refuse to discuss plea or sentencing agreements, thereby failing to exercise their discretion to seek death only when it is warranted.

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[46] OFFICE OF THE OHIO PUBLIC DEFENDER, STATE MAXIMUM FEE SCHEDULE FOR APPOINTED COUNSEL REIMBURSEMENT 13 (3d ed. 2000), *available at* http://www.state.oh.us/opd/reimb/rm_frmpg.htm.

[47] *See* OFFICE OF THE OHIO PUBLIC DEFENDER, REIMBURSEMENT SCHEDULE FOR APPOINTED COUNSEL IN CAPITAL TRIALS (1997) (on file with author).

[48] THE OHIO ST. BAR ASS'N, THE 1998 DESKTOP REFERENCE ON THE ECONOMICS OF LAW PRACTICE IN OHIO, Exhibits 19, 20.

Both statistics and public statements of prosecutors demonstrate these claims to be true. In Cuyahoga County, 825 persons have been indicted with death specifications since 1981, when Ohio's death penalty law went into effect. Relatively few went to trial, and of those who did, only thirty-nine were sentenced to death.[49] Assistant Cuyahoga County Prosecutor Carmen Marino, when questioned in 1993 about the practice of over-indicting in order to obtain plea bargains, said it would not happen "anymore."[50] Local attorneys report no observable change in indictment patterns, however. The United States Supreme Court long ago recognized that there are many reasons for an innocent man or woman to plead guilty to a crime. One of those is to avoid a death sentence.[51]

On the other hand, Hamilton County has indicted only 123 persons with capital specifications. Forty-one of those persons are now on death row.[52] Former Hamilton County Prosecuting Attorney and current Ohio Treasurer of State Joseph Deters has stated that he will seek a death penalty indictment in every case that fits the statutory parameters.[53] Plea agreements will be available only in the most extraordinary of cases. The only exception to his indictment rule is that a death sentence will not be sought, regardless of the facts of the crime, if he does not believe he can win the case.[54] Under these guidelines a mentally retarded, eighteen-year old, who kills during a robbery, will face a capital trial, not because the facts of his crime are worse than those of a mentally superior organized crime hit man who kills repeatedly for money, but because he was less capable of hiding the evidence.

Other counties' indictment patterns raise similar concerns. Franklin County has indicted over 300 capital cases but sent only eight men to death row. Lucas County has indicted 102 and placed twelve on death row. Fifty-six Ohio counties have not prosecuted a capital case under Ohio's 1981 death penalty statute.[55]

It is commonly repeated by judges, prosecutors, and defense lawyers that "a jury trial is like a roll of the dice—a gamble." No one involved in the criminal justice system pretends that every innocent person will be acquitted or every guilty person convicted. Prosecuting Attorney Deters acknowledges that executing some innocent persons is a part of the cost of the death penalty.[56] When

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[49] Telephone Interview with Ms. Chris Mason, Public Defender, Ohio Public Defender Office, (June 3, 1997).

[50] Carmen Marino, Address at the Ohio Death Penalty Seminar in Cleveland, Ohio (June 25, 1993).

[51] *See* North Carolina v. Alford, 400 U.S. 25, 27, 31 (1970).

[52] Interview with Ms. Chris Mason, *supra* note 49.

[53] Joseph Deters, Address at the University of Cincinnati College of Law (Feb. 22, 1997).

[54] *Id.*

[55] Interview with Ms. Chris Mason, *supra* note 49.

[56] Joseph Deters, *supra* note 53. Execution of the innocent is perhaps always a danger when convictions are based upon proof beyond a reasonable doubt. There is a difference between reasoned assurance and absolute truth that society has decided to tolerate in the criminal justice system. However, when proper procedures are not followed, the margin of

prosecutors make capital charging decisions without exercising the discretion to eliminate those crimes that might technically fall within the parameters of the statute, but do not warrant a death sentence, the first step in a system, that if used properly would add reliability to capital sentences, has been eliminated. When cases are over-indicted, those defendants who do not succumb to the coercion by entering a guilty plea face the possibility of execution for a crime the state knew, in the first instance, did not warrant that extreme penalty. Again, the first step in a process intended to guarantee reliability has failed.

Other factors that undermine the reliability of charging decisions include geographic location, expense, and inadequate statutory guidance. It is widely believed that local factors account for substantial variations in capital charging decisions. When a victim is well known in the community, when the jurisdiction has a low crime rate and thus suffers a greater public reaction to a serious crime, or when a crime occurs in an area with a small tax base, the decision to seek a capital indictment may rest on those factors rather than the crime itself. Felony-murder cases are particularly susceptible to variations in treatment because the statutes, Ohio Revised Code section 2903.01(B) and section 2929.04(A)(7), offer little guidance to a prosecutor in determining which crimes are capital and which are not.[57] For example, a murder committed during an aggravated robbery may be charged as a death eligible aggravated murder under Ohio Revised Code section 2903.01(B) or as a capital murder with a specification under section 2929.04(A)(7) with no change in facts to distinguish or explain the choice of charges.

Recommendations

The death penalty statute should be redrafted to more narrowly define those cases in which death is a possible punishment, thus providing prosecuting attorneys with a guided discretion that will more accurately reflect a statewide view of what is a death penalty case. The felony-murder specification, Ohio Revised Code section 2929.04(A)(7), should be eliminated. Felony-murder is already an aggravated murder under Ohio Revised Code section 2903.01(B).[58] Felony-murders should become death-eligible only when a clearly defined statutory factor, other than the defendant's participation in the felony is present.

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error—which is the difference between proof beyond a reasonable doubt and absolute truth—acceptable to society is exceeded and more innocent people than necessary for society's benefit are executed. The fact that at least some innocent persons are on Ohio's death row has been acknowledged by the Ohio Attorney General's Office. *Ohio's Talking* (Ohio News Network television broadcast, July 10, 2000) (panel discussion with James V. Canepa, Capital Crimes Section Chief, Office of the Ohio Attorney General).

[57] *See generally* OHIO REV. CODE ANN. §§ 2903.01(B), 2929.04(A)(7) (Anderson 2001).

[58] OHIO REV. CODE ANN. § 2903.01(B) (Anderson 2001).

Update

Felony-murder cases are even more susceptible to variations in treatment by prosecutors than they were in 1997. In 1998, the Ohio legislature enacted another felony-murder offense by making it a form of murder to cause the death of another as a proximate result of committing or attempting to commit a felony offense of violence.[59] Now, the prosecutor making a charging decision in the case of a killing during an aggravated robbery has at least three offenses from which to choose: aggravated murder under Ohio Revised Code section 2903.01, aggravated murder with a death specification under Ohio Revised Code section 2929.04(A)(7), or simple murder under Ohio Revised Code section 2903.02(B). Involuntary manslaughter is also available when the defendant caused the death of another as a proximate result of the offender's committing or attempting to commit a felony under Ohio Revised Code section 2903.04(A). The sentencing consequence of conviction, under these facts and depending on the statute used for charging, could be anywhere from three years, to life without parole, or death. There is still little or no guidance provided to a prosecutor as to how to choose among these offenses.

B. *Ohio Has Not Adequately Narrowed the Class of Offenders Who Are Eligible for Death, but Rather Continually Expands the Situations in Which Death Is a Possible Sentence.*

In order to meet federal constitutional standards, the death penalty must be used only for the worst of crimes. Statutes defining crimes that are death-eligible must narrow the class of offenders in a rational and meaningful way.[60] The Ohio legislature chose to identify this narrow class by requiring indictment and proof of a statutory aggravating circumstance[61] to make an aggravated murder[62] death-eligible. Legislative and judicial changes have greatly expanded the categories of crimes and offenders who are death-eligible in Ohio.

1. *Legislative Actions*

a. *Adding New Aggravating Circumstances and/or Broadening Their Definitions*

The aggravating factors that make a crime death-eligible continue to change. Although killing a peace officer has been an aggravating circumstance since the

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[59] OHIO REV. CODE ANN. § 2903.02(B) (Anderson 2001).
[60] *See* Zant v. Stephens, 462 U.S. 862, 877 (1983).
[61] OHIO REV. CODE ANN. § 2929.04(A) (Anderson 2001).
[62] OHIO REV. CODE ANN. § 2903.01 (Anderson 2001).

inception of Ohio's current death penalty scheme, the definition of "peace officer" was broadened in 1996 to include a greater number of persons.[63] The age of the victim did not determine death eligibility until 1997, when causing the death of one under 13 years of age was made an aggravating circumstance.[64] Also, the definition of "person" was expanded in 1996 to include a viable fetus, thus making the murder of a pregnant woman in the third trimester of her pregnancy a multiple murder,[65] and therefore an aggravating circumstance.[66]

Recommendation

New aggravating circumstances should be added to the list of factors that make a crime death-eligible with extreme care.

Update

The Ohio legislature has expanded death-eligibility even further in recent years. Yet another form of aggravated murder, a killing while under detention or a break in that detention, was created.[67] An already existing aggravating circumstance was likewise expanded to include offenses committed "while the offender was at large after having broken detention."[68] This makes most, if not all, such killings automatically death-eligible.

b. *Failing to Exclude the Mentally Retarded From Execution*

Mental retardation impacts day-to-day functioning, learning ability, judgment, and memory. This lifelong disability affects only three percent of the population. This group is one society has traditionally sought to help and understand, yet Ohio has not exempted the mentally retarded from death-eligibility. A number of persons known to be retarded have been sentenced to die.[69] There are likely more mentally retarded persons on Ohio's death row who were not recognized as such at the time of trial. The American Bar Association has called for a moratorium on the use of the death penalty, citing execution of the mentally retarded as one of the four major reasons for the action.[70] Other states, as

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[63] OHIO REV. CODE ANN. § 2935.01(B) (Anderson 2001).

[64] OHIO REV. CODE ANN. § 2929.04(A)(9) (Anderson 2001).

[65] OHIO REV. CODE ANN. § 2901.01(B)(1) (Anderson 2001).

[66] OHIO REV. CODE ANN. § 2929.04(A)(5) (Anderson 2001).

[67] OHIO REV. CODE ANN. § 2903.01(D) (Anderson 2001).

[68] OHIO REV. CODE ANN. § 2929.04(A)(4) (Anderson 2001).

[69] *See, e.g.*, State v. Hill, 595 N.E.2d 884, 901–02 (Ohio 1992); State v. Holloway, 527 N.E.2d 831, 838–40 (Ohio 1988); State v. Rogers, 478 N.E.2d 984, 996–97 (Ohio 1985); State v. Jenkins, 473 N.E.2d 264, 300–01 (Ohio 1983).

[70] *Report with Recommendations No. 107*, *supra* note 3.

well as the federal government, have already taken this step. Ohio should follow suit.

Recommendation

Mentally retarded persons should be exempt from the death penalty.

Update

The OSBA declined to oppose the execution of the mentally retarded after members of the Council of Delegates expressed concern that such a move might discourage equal treatment of the mentally retarded in other arenas. Eighteen states and the federal government have now banned the execution of the mentally retarded.[71] Recently, the United States Supreme Court granted review of the question in *Atkins v. Virginia*.[72]

2. *Judicial Expansion of Death-Eligible Crimes*

The Ohio Supreme Court expanded the circumstances in which the death penalty may be used through activist statutory interpretation of the aggravated murder statute and the statutory aggravating circumstances.

a. *The "Purposely" Culpable Mental State*

The "purposely" mental state is an element of all forms of aggravated murder and distinguishes it as the most serious form of homicide under Ohio law. "Purposely" is defined in Ohio Rev. Code section 2901.22(A) as the specific intention to cause a certain result (in aggravated murder cases, the death of another). The requirement that the prosecution prove that death was the specifically intended result of the accused's conduct was a rejection of the traditional felony-murder rule, which presumes intent to kill from the commission of an underlying felony. The 1974 Legislative Service Committee Note to Ohio Revised Code section 2903.01 emphasizes this point: "The second part of the section defines the offense of felony-murder. The requirement that the killing must be purposeful is retained." Because aggravated murder is the only crime to

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[71] Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, North Carolina, Nebraska, New Mexico, New York, South Dakota, Tennessee, and Washington all have banned the execution of the mentally retarded. *See* Death Penalty Information Center, *Mental Retardation and the Death Penalty*, *at* http://www.deathpenaltyinfo.org/dpicmr.html (last visited Jan. 14, 2002).

[72] 534 S.E.2d 312 (Va. 2000), *cert. granted sub. nom.* Atkins v. Virginia, 70 U.S.L.W. 3232 (U.S. Sept. 25, 2001) (No. 00-8452).

which death specifications may attach, only those who actually intend to kill may be eligible for death.

However, the Ohio Supreme Court has periodically reduced this specific intent to kill requirement. In *State v. Lockett*,[73] the Court said purpose could be presumed from the fact that (1) a person engaged in a common design with others to commit a felony offense by force and violence or (2) the offense and the manner of its commission would be likely to produce death.[74] In *Lockett*, the jury was told that persons are presumed to intend the natural and probable consequences of their voluntary acts and that the purpose was presumed from the use of a weapon (even though the death allegedly occurred during an unexpected struggle over the weapon between two others, and the defendant, Sandra Lockett, was down the street at the time).

Such presumptive devices were later held violative of the due process clause by the U.S. Supreme Court because they relieved the state from actually proving specific intent to kill, and impermissibly shifted the burden of proof on an element of the crime to the defendant.[75] But the Ohio Supreme Court still reverts to these presumptions when denying the need for lesser offense instructions[76] and when finding the evidence sufficient to support the conviction.[77] Thus, the Ohio Supreme Court's review process fails to ensure that the required specific intent to cause the death was in fact present and proven.

Additional diminution in the required mental state occurs when trial judges instruct under Ohio Revised Code section 2901.22(A) that an act is purposeful when the gist of the offense is a prohibition against conduct of a certain nature, and regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature. This instruction is incorrect in a result-oriented offense such as aggravated murder, and the comments to the Ohio Jury Instructions (O.J.I.) advise judges not to tell jurors this due to its misleading nature.[78] Jurors are invited by this instruction both to convict on aggravated murder merely because the defendant intended to engage in a felony and to ignore whether the defendant desired or intended that death occur.

This significantly lowers the intent requirement. However, the Ohio Supreme Court only recently acknowledged the impropriety of this instruction, in *Ohio v. Carter*[79] and *Ohio v. Wilson*.[80] Even though judges had been warned not to give

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[73] 358 N.E.2d 1062 (Ohio 1976).

[74] *Id.* at 1070–71.

[75] Francis v. Franklin, 471 U.S. 307, 314 (1985); Sandstrom v. Montana, 442 U.S. 510, 518, 524 (1979).

[76] *See* State v. Williams, 660 N.E.2d 724, 730 (Ohio 1996); State v. Thomas, 533 N.E.2d 286, 288–89 (Ohio 1988); State v. Clark, 527 N.E.2d 844, 849 (Ohio 1988).

[77] *See* State v. Garner, 356 N.E.2d 623, 634 (Ohio 1995); State v. Jester, 512 N.E.2d 962, 968 (Ohio 1987).

[78] 4 OHIO JURY INSTRUCTIONS § 409.01 (Anderson 2000).

[79] 651 N.E.2d 965, 973–74 (Ohio 1995).

the instruction found in the O.J.I., the Ohio Supreme Court has found the error waived unless defense counsel specifically objected to the instruction, and the court has imposed on the defendant, who was convicted by a misled jury, the burden of proving the result of his trial clearly would have been different if a correct instruction was given.[81] This is a nearly impossible standard.

Further lowering of the standard of intent to kill occurs when the jury is instructed that the defendant can be found to have caused the death if some reasonable person would simply have anticipated that death was likely to result. This has been a standard instruction in murder cases that was not disapproved until the decision in *State v. Burchfield*.[82] Even then the Ohio Supreme Court provided no guidance as to how to properly instruct on causation.[83] As a result trial judges are still uncertain how to proceed.

Recommendation

The jury instruction defining "purposely," when used in conjunction with an aggravated murder charge under Ohio Revised Code section 2903.01, should be codified as: "A person acts purposely when it is his intention to cause the death of the person killed." This was the legislative intent when Ohio Revised Code section 2903.01(D) was enacted, but it has effectively been read out of the statute.[84] The new language should appear in section 2903.01, as well as O.J.I. The reason for the existing confusion is that the statutory definition of "purposely" that appears in Ohio Revised Code section 2901.22(A) addresses two types of crimes: result oriented and conduct oriented. Aggravated murder falls into the first category, but the definition for the second category is mistakenly used to instruct capital juries.

Update

Instead of improving the situation, the Ohio legislature made it more likely that trial courts will utilize the impermissible presumption found in *Lockett* by repealing then Ohio Rev. Code section 2903.01(D) and its specific direction as to how to properly instruct juries on inferring specific intent to kill from the accused's commission or involvement in the commission of an underlying felony. On the other hand, a recent revision to the Ohio Jury Instructions now more

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[80] 659 N.E.2d 292, 305 (Ohio 1996).

[81] *Id.*

[82] 611 N.E.2d 819, 821 (Ohio 1993) (finding that the instruction has the "potential to mislead jurors").

[83] *Id.*

[84] *See* LEGISLATIVE SERVICE COMMISSION, *1974 Legislative Service Commission Commentary to H511*, *in* THE OHIO CRIMINAL LAW HANDBOOK (Amy B. Brann ed., 17th ed. 1997).

clearly directs the capital trial jury that it must find that the defendant specifically intended to kill.[85] That same O.J.I. section reminds trial judges not to instruct on unlawful presumptions. Whether Ohio judges will heed this direction and reminder is less than certain. The OSBA recommendation should still be implemented.

b. *The Mental State Required For a Finding of Prior Calculation and Design Has Been Diminished*

The Ohio General Assembly wrote Ohio Revised Code section 2903.01(A)'s "prior calculation and design" element "so as to embody the classic concept of the planned, cold-blooded killing while discarding the notion that only an instant's prior deliberation is necessary."[86] Lawmakers tried to distance this form of aggravated murder from its predecessor "premeditation and deliberation" element, which had, "by judicial interpretation," deteriorated into a holding that "murder could be premeditated even though the fatal plan was conceived and executed on the spur of the moment."[87]

The "prior calculation and design" element was adopted to require proof of facts that "indicate studied care in planning or analyzing the means of the crime, as well as a scheme encompassing the death of the victim."[88] Yet in a recent case, the Ohio Supreme Court majority found the evidence sufficient to convict, even though the barroom incident was nothing more than an instantaneous eruption of events in which the repeated gunshots demonstrated intent to kill but could not prove prior calculation and design.[89]

Recommendation

A mandatory jury instruction on "prior calculation and design," as used in Ohio Revised Code section 2903.01(A), should be included in that statute and should include a requirement that there be proof of "studied care in planning or analyzing the means of the crime, as well as a scheme encompassing the death of the victim."

Update

Since this recommendation was made, the Ohio Supreme Court acknowledged that "it is not possible to establish a 'bright-line' test that emphatically distinguishes between the presence or absence of 'prior calculation

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[85] 4 OHIO JURY INSTRUCTIONS § 503.01(2)(B) (Anderson 2000).

[86] LEGISLATIVE SERVICE COMMISSION, *supra* note 84.

[87] *Id.*

[88] *Id.*

[89] *See* Ohio v. Taylor, 676 N.E.2d 82, 89–91, 99–101 (Ohio 1997).

and design."[90] Members of the Court have vigorously disagreed about the sufficiency of evidence in cases where proof of prior calculation and design is at issue. The Court's struggle demonstrates that prior calculation and design is likely too loosely defined to serve as a basis for determining who will be eligible for an aggravated murder conviction and/or who will be eligible for death under Ohio Revised Code sections 2929.04(A)(7) and (A)(9) (the aggravating circumstances that also rely on it). The Ohio Jury Instructions section 503.01(3) now defines prior calculation and design in language close to that which is recommended, but a more precise and limiting definition by the legislature would better assure that death is reserved only for the most culpable offenders.

c. *Fundamentally Altering the "While Committing a Felony" Requirement in Aggravated Felony-Murder Cases*

Ohio Revised Code section 2903.01(B), the aggravated felony-murder statute, reads: "No person shall purposely cause the death of another . . . while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit [certain enumerated felonies]."[91] The aggravating circumstance found in Ohio Revised Code section 2929.04(A)(7) restates this language to make the offense death-eligible.[92] These provisions, by use of the word "while," require that the accompanying enumerated felony be in process when the killing occurs, i.e., the defendant must either be in the course of committing the felony or be attempting to commit it when the death occurs.[93]

Notwithstanding the plain language of the statute, the Ohio Supreme Court has determined that "[n]either the felony-murder statute nor Ohio case law requires the intent to commit a felony to precede the murder in order to find a defendant guilty of a felony-murder specification [or the felony-murder itself]."[94] Previous case law held that a killing perpetrated "while committing or attempting to commit [a felony]"[95] could include a killing committed somewhat after the felony so long as the killing was "directly associated with the [underlying felony] as part of one continuous occurrence."[96] In the recent *Williams*[97] and *Biros*[98]

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[90] State v. Goodwin, 703 N.E.2d 1251, 1263 (Ohio 1999) (quoting State v. Taylor, 676 N.E.2d 82, 89 (Ohio 1997)).

[91] OHIO REV. CODE ANN. § 2903.01(B) (Anderson 2001).

[92] *See* OHIO REV. CODE ANN. § 2929.04(A)(7) (Anderson 2001).

[93] Attempt requires, minimally, an intent to commit the felony and conduct, which, if successful, would result in the felony offense and that constitutes substantial steps toward commission of the felony. OHIO REV. CODE ANN. § 2923.02 (Anderson 2001).

[94] State v. Williams, 660 N.E.2d 724, 730 (Ohio 1996); *accord* State v. Biros, 678 N.E.2d 891, 911 (Ohio 1997).

[95] OHIO REV. CODE ANN. § 2903.01 (Anderson 2001).

[96] State v. Cooey, 544 N.E.2d 895, 903 (Ohio 1989).

[97] 660 N.E.2d at 730.

[98] 678 N.E.2d at 911.

cases, the Court once again substituted this "direct association" concept for the clear "while" statutory language, thus negating the rationale for Ohio's felony-murder rule—that the high risk behavior of committing the felony substitutes for prior calculation and design.[99]

The Court's insupportable interpretation fundamentally alters this essential element of the crime by ignoring altogether the plain statutory mandate that one must be committing, or at least attempting to commit, a felony when the killing occurs. These decisions, holding that it is irrelevant whether the felony was in progress or even intended at the time of the killing, are in clear conflict with the plain language of the statute. They utterly ruin any distinction among offenders and arbitrarily and unforeseeably expand the reach of the capital murder statutes. Offenders should be indicted as the legislature intended in these cases when no felony or attempt was underway at the time of the killing: with a murder charge and a separate felony count.

Recommendation

The felony-murder specification should be eliminated from Ohio Revised Code section 2929.04(A)(7). If it is not, the word "while" should be defined, and juries should be instructed that it means that the killing occurred during the time in which the underlying felony was being committed or attempted, or when the offender was fleeing the scene after committing or attempting to commit the underlying felony.

Update

The felony-murder specification has not been eliminated. The Ohio Supreme Court's over-expansive definition of "while" remains to capture for death those who did not intend to commit the felony at the time of the homicide. The Ohio Jury Instructions section 503.01(5) would have juries instructed that "the death must occur as part of acts leading up to, or occurring during or immediately after the commission of [the felony] and that the death was directly associated with the [felony]."[100] This instruction not only fails to solve the problem, but instead further expands the category of homicides that will qualify as aggravated murders and be death-eligible by including those that occur "leading up to" the felony and by retaining the concept of association rather than requiring that the death be in furtherance or in consequence of the felony.[101]

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[99] State v. Carver, 283 N.E.2d 662, 670–71 (Ohio Ct. App. 1971), *aff'd*, 285 N.E.2d 26 (Ohio 1972); Lindsey v. State, 69 N.E. 126, 131 (Ohio 1903); Robbins v. State, 8 Ohio St. 131, 177 (1857).

[100] 4 OHIO JURY INSTRUCTIONS § 503.01(5) (Anderson 2000).

[101] A further critique of Ohio's felony-murder rule and Ohio Supreme Court decisions interpreting it is provided in the article by Professor Dana K. Cole. *See* Dana K. Cole,

C. *Racial Bias*

Racial bias continues to be a factor in who receives a death sentence and who does not.[102] This phenomenon is recognized nationally and was documented by the United States General Accounting Office.[103] Its review of twenty-eight studies on the influence of race in capital cases showed "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty."[104] Ohio has not escaped it. "[In Ohio] [b]lack offenders are disproportionately represented at all points on the crime/justice continuum."[105] Certain trial procedures exacerbate the problem.

It is widely recognized that members of minority races are under- represented in voter registration lists and in juries drawn from those lists. Ohio continues to mandate that voter registration lists be the primary source of potential jurors.[106]

It is well documented that the aspect of voir dire known as "death qualification"—a process whereby all those who have qualms about use of the death penalty are removed from the jury—results in further under-representation of African Americans on capital juries.[107] All efforts to overcome this problem—from seating two juries to seating extra alternates and engaging in death qualification only if the defendant is convicted—have been rejected by the courts as too cumbersome.

The Ohio Commission on Racial Fairness held hearings around the state to determine the role race plays in the criminal justice system. The Commission addressed a number of matters specific to capital cases. In some counties there is an unwritten rule that two African American attorneys will not be appointed to a capital case.[108] In other counties, African American attorneys testified that they were excluded from appointment in capital cases.[109]

Expanding Felony-Murder in Ohio: Felony-Murder or Murder-Felony?, 63 OHIO ST. L.J. 15 (2002).

[102] *See* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 249–74 (Hugo Adam Bedau ed., 1997).

[103] U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/GGD-90-57, REPORT TO SENATE AND HOUSE COMMITTEES ON THE JUDICIARY: DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), *available at* http://161.203.16.4/t2pbat11/140845. pdf.

[104] *See id.* at 5.

[105] OFFICE OF CRIMINAL JUSTICE SERVICES, THE STATE OF CRIME AND CRIMINAL JUSTICE IN OHIO 22 (1995).

[106] State v. Hill, 595 N.E.2d 884, 895 (Ohio 1992).

[107] *See, e.g.*, Welsh S. White, *The Constitutional Invalidity of Convictions Imposed by Death Qualified Juries*, 58 CORNELL L. REV. 1176, 1195 (1973).

[108] *Transcript of Testimony Before the Ohio Commission on Racial Fairness* 18 (Oct. 29, 1994) (on file with the author).

[109] *Transcript of Testimony Before the Ohio Commission on Racial Fairness* 84–85 (Sept. 24, 1994) (on file with the author); *Transcript of Testimony before the Ohio Commission on Racial Fairness* 55 (Oct. 29, 1994) (on file with the author).

Ohio's death row population is over 50% African American.[110] The state's African American population is approximately 11.5%.[111] Only two white persons are on death row for killing an African American.[112] Forty-one African Americans are on death row for killing a white person.[113] These statistics are even more shocking in light of a highly esteemed Franklin County judge's opinion that, in that county, due to racial bias, the death penalty is "disproportionately given to whites."[114] If, as appears to be the case, racial bias is a factor in sentencing one race in some counties and another race in others, the arbitrariness caused by our inability to leave prejudice outside the courtroom doors requires that no execution take place under the system as it now stands.

Recommendation

That Ohio Revised Code section 2953.21 should be expanded to grant post-conviction relief when the defendant demonstrates a pattern of racial disparity in the practices of any decision maker (not only the judge), whose decisions led to the defendant's arrest, prosecution, or sentencing.

Update

The Report of the Ohio Commission on Racial Fairness was released in 1999. The Commission found that "[b]lack males compose approximately five percent of the Ohio population, yet they compose 50 percent of death row inmates,"[115] and that "[a] perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black."[116] In fact, blacks are more often the victims of homicide than whites.[117] The United States Department of Justice reports that "in 1998, four whites, twenty-three blacks, and three persons of other

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[110] BRENDA L. JONES, OHIO PUBLIC DEFENDER COMMISSION, DEATH PENALTY PROPORTIONALITY STATISTICS 1 (2001), *available at* http://www.state.oh.us/opd/dp/dp_prosta.pdf. These figures do not include five multiple murders in which victims were of both races. *See id.*

[111] OHIO DEPT. OF DEVELOPMENT, OFFICE OF STRATEGIC RESEARCH, OHIO 2000 DEMOGRAPHIC PROFILE: CHARTING THE CHANGES 1 (2001), *available at* http://www.odod.state.oh.us/osr/2000pptpres.pdf.

[112] JONES, *supra* note 110, at 1.

[113] *Id.*

[114] Letter from Judge Dale A. Crawford, Franklin County Court of Common Pleas, to Ohio State Bar Association Criminal Justice Committee 1 (July 3, 1997) (on file with author).

[115] OHIO COMM'N ON RACIAL FAIRNESS, REPORT 37 (1999).

[116] *Id.* at 38.

[117] U.S. DEP'T OF JUSTICE, SPECIAL REPORT: VIOLENT VICTIMIZATION AND RACE, 1993–98, 1 (2001), *available at* http://www.ojp.usdoj.gov/bjs/abstract/vvr98.htm (last visited Jan. 14, 2002).

races were murdered per 100,000 persons in each racial group."[118] Recognizing that "[t]he numbers speak for themselves," the Commission said, "[t]he implication of race in this gross disparity is not simply explained away and demands thorough examination, analysis, and study until a satisfactory explanation emerges which eliminates race as a cause for these widely divergent numbers."[119] In its conclusion the Commission noted, "[i]f our system is to survive, if it is to be respected and obeyed, all of the barriers to universal perceptions by significant majorities of all groups within our citizenry that the system is just must be destroyed. If that means spending more money, adding additional procedures, or eliminating objectionable practices, it is a small price to pay to reach that goal."[120] The same racial disparities found by the Ohio Commission on Racial Fairness have been documented throughout the country.[121] No legislative action has been taken on the OSBA recommendation.

D. *The Sentencing Decision: Ohio's Capital Sentencing Statute, As Applied, Has Failed to Guide Jurors' Discretion, Has Failed to Set a Consistent Standard for Capital Sentencing Decisions, and Has Allowed the Courts to Usurp the Jury's Statutorily Mandated Sentencing Function.*

Ohio juries do not receive sufficient guidance to make a capital sentencing decision. Standard jury instructions fail to provide the constitutionally mandated guidance necessary to make reliable sentencing determinations. Jurors who made capital sentencing decisions in 1981 did so under instructions different from those given to jurors in 1997. Although the statutory sentencing process has not been altered, case law keeps changing the way in which juries decide capital sentencing proceedings.

1. *Inadequate Jury Instructions Fail to Guide Juror Discretion*

Although no decision could be more important, jurors deliberating during the penalty phase are not adequately instructed on how to go about doing their job. Studies conducted by James Frank, PhD, of the University of Cincinnati, have established that less than half, 47.4%, of jurors who were read the actual instructions given in a capital trial could correctly answer questions regarding their deliberative task.[122] However, when jurors were read the same instructions

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[118] *Id.*

[119] OHIO COMM'N ON RACIAL FAIRNESS, *supra* note 115, at 38 (1999).

[120] *Id.* at 74.

[121] *See* Richard C. Dieter, *The Death Penalty in Black & White: Who Lives, Who Dies, Who Decides*, at 1 (1998), *at* http://www.deathpenaltyinfo.org/racerpt.html (last visited Jan. 14, 2002).

[122] *See* Aff. of James D. Frank, State v. Waddy, No. 96-CR-60-3182 (Franklin Co. C.P. 1996); James Frank & Brandon K. Applegate, *Assessing Juror Understanding of Capital-*

rewritten in plain English by a professional linguist, the number dramatically improved to 68.2%.[123]

The poor rate of retention is not simply due to the use of "legalese." It is also due to the absence of instructions on some topics. For example, where there are two or more counts in the indictment, each of which contains an aggravating circumstance, the jurors are not told whether to cumulate the aggravators and weigh them against the mitigating circumstances (the wrong answer) or to weigh each aggravator separately against all mitigating factors (the correct answer).[124] There are numerous situations like this where there is no model instruction in the Ohio Jury Instructions or elsewhere. Lack of jury instructions on such critical issues guarantees arbitrary and unreliable jury verdicts. No capital execution should take place when the sentence was rendered by an improperly instructed jury.

2. *Constant Changes in Allowable Jury Instructions Make the Circumstances Under Which Death Verdicts Are Returned Widely Variable and Inconsistent*

Between 1981 and 1988, jurors were often instructed that they were to weigh the specific aggravating circumstances proved against all of the mitigating factors listed in Ohio Revised Code section 2929.04(B), even though the defendant had not presented evidence on all of those factors. In 1988, the Ohio Supreme Court said that juries are to be instructed to consider only mitigating factors upon which evidence is presented.[125] This is because the absence of evidence on some factors may be wrongly perceived as aggravating or as a failure on the part of the defense.[126] Although the court has recognized that this improper instruction invites the jurors to engage in improper and inaccurate weighing of the mitigating and aggravating circumstances, the error consistently has been found to be harmless.

Capital defendants have repeatedly challenged the use of the nature and circumstances of the offense as aggravating circumstances to be weighed in favor of a death sentence. In *State v. Gumm*,[127] the Ohio Supreme Court seemed to suggest that the nature and circumstances of the crime could be weighed in favor of a death sentence. Older cases said the nature and circumstances of the offense

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Sentencing Instructions, 44 CRIME & DELINQ. 412, 412 (1998); *see also* Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death*, 79 JUDICATURE 224 (1996).

[123] *Id.*

[124] State v. Cooey, 544 N.E.2d 895, 916–17 (Ohio 1989).

[125] *See* State v. DePew, 528 N.E.2d 542 (Ohio 1988).

[126] *See id.* at 551–57 (Ohio 1988); *see also* State v. Lorraine, 613 N.E.2d 212, 221–22 (Ohio 1993); State v. Davis, 581 N.E.2d 1362, 1379–80 (Ohio 1991); Cooey, 544 N.E.2d at 917.

[127] 653 N.E.2d 253, 259–64 (Ohio 1995).

could be used to explain or support the aggravating circumstances.[128] Only in 1996, in *State v. Wogenstahl*,[129] did the court modify the language in *Gumm* and finally make it clear that the nature and circumstances of the offense can be weighed only "on the side of mitigation."[130] For the fifteen years prior to the *Wogenstahl* decision, the nature and circumstances of the offense were presented by prosecutors[131] and courts[132] as aggravating.

The Ohio Supreme Court made clear in *State v. Jenkins*[133] that aggravating circumstances based on the same actions must be merged. They cannot be double and triple counted and then weighed against the mitigating evidence.[134] However, the problem still occurs. Juries are mistakenly instructed to weigh duplicative aggravating circumstances against the mitigating factors.[135]

Jury instructions that lessen the jurors' sense of responsibility invalidate a death sentence.[136] Ohio jurors make a sentencing recommendation to the court in capital cases.[137] A life recommendation is binding and cannot be changed by the trial judge.[138] However, a death recommendation can be overridden by the court.[139] Of the over 200 death verdicts that have been rendered in Ohio, only four have been overridden by the trial court. Despite this, jurors are often told that their verdict is only a recommendation and that the court will make the ultimate decision. The Ohio Supreme Court has said that this practice should stop; yet it continues and is consistently held to be harmless error.[140]

Recommendations

It is recommended that standardized jury instructions for capital cases be devised and published with the caveat that in every case there may be cause to use additional or modified versions of the same. These instructions must be written in plain, intelligible English. Additionally, it is recommended that the Ohio Judicial Conference appoint a committee of judges and members of the bar engaged in

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[128] State v. Stumpf, 512 N.E.2d 598, 598–601 (Ohio 1987); State v. Steffen, 509 N.E.2d 383, 390 (Ohio 1987).

[129] 662 N.E.2d 311 (Ohio 1996).

[130] *Id.* at 321–22.

[131] *Gumm*, 653 N.E.2d at 259–64; *DePew*, 528 N.E.2d at 551 (Ohio 1988).

[132] State v. Benner, 533 N.E.2d 701, 717–18 (Ohio 1989).

[133] 473 N.E.2d 264, 294–95 (Ohio 1983).

[134] *Id.*

[135] State v. Garner, 656 N.E.2d 623, 629–32 (Ohio 1995).

[136] *See* Caldwell v. Mississippi, 472 U.S. 320, 323 (1985).

[137] OHIO REV. CODE ANN. § 2929.03(D)(2) (Anderson 2001).

[138] *Id.*

[139] § 2929.03(D)(3) (Anderson 2001).

[140] State v. Carter, 651 N.E.2d 965, 977–78 (Ohio 1995); State v. Durr, 568 N.E.2d 674, 686–87 (Ohio 1991) (Wright, J., dissenting); State v. Bueke, 526 N.E.2d 274, 280–82 (Ohio 1988); State v. Buell, 489 N.E.2d 795, 812–13 (Ohio 1986).

capital litigation to assist in creating these instructions and that these instructions be published in the Ohio Jury Instructions.

Update

After nearly twenty years of litigation under the 1981 death penalty statute, judges and litigators finally have a model set of jury instructions to guide them in capital trial and penalty phases. The Ohio Judicial Conference Editorial Board approved capital case instructions in April 2000. The model jury instructions relieve a number of the substantive difficulties identified in the text of the OSBA report.

New O.J.I. section 503.011(6) informs jurors that the penalty for each murder count (if there is more than one) must be determined separately, and that only the aggravating circumstances related to that count may be considered and weighed against the mitigating factors in determining the penalty for that count.[141]

The instructions under O.J.I. sections 503.011(7) and (9), describing the aggravating circumstances, each include commentary noting the requirement that the trial court merge duplicative aggravating factors that arise from the same act or indivisible course of conduct before submitting the sentencing phase case to the jury.[142] However, it remains to be seen whether this will be regularly done.

The Comment to O.J.I. section 503.011(10) reiterates the case law holding that the court should not instruct on mitigating factors identified in Ohio Revised Code section 2929.04(B) but not raised by the defense.[143] It adds the Committee's view that the court should instruct on all mitigating factors raised by the evidence, regardless of who produced it, if requested by the defense.[144] This practice, if followed, should reduce the frequency with which absence of a mitigating factor is made into an aggravating factor.

The new instructions eliminate consideration of the nature and circumstances of the offense as aggravating factors. O.J.I. section 503.011(10) includes a reference to the nature and circumstances of the crime as an aspect of mitigation,[145] and O.J.I. section 503.011(24) follows up on this point, stating, "When you consider the nature and circumstances of the offense, you may only consider them if they have any mitigating value. You may not consider the nature and circumstances of the crime as an aggravating circumstance."[146]

Jurors should no longer be instructed that their sentencing verdict is merely a "recommendation." New O.J.I. section 503.011(26) eliminates use of the word "recommendation" in the instructions and/or the verdict forms and instead

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[141] 4 OHIO JURY INSTRUCTIONS § 503.011(6) (Anderson 2000).
[142] *Id.* § 503.011(7) & (9) (Anderson 2000).
[143] *Id.* § 503.011(10) cmt. (Anderson 2000).
[144] *Id.*
[145] *Id.* § 503.011(10) (Anderson 2000).
[146] *Id.* § 503.011(24) (Anderson 2000).

requires that the jury inform the court of the sentence that "should be imposed upon the defendant."[147] This is an obvious improvement over "recommendation" language, but there may still be some risk that the jurors will have a diminished sense of responsibility over their decision as it may still appear to some that their decision is simply advisory.

Although there is now greater hope for better and proper jury instructions being given in future capital cases through adoption of the O.J.I.'s capital trial jury instructions, most of the presently condemned did not have this benefit. Instructions were so disparate, and decisions respecting them so changeable, that little certainty is presented as to the appropriateness of the penalties imposed under them. Because the lawyers and the courts were often equally uncertain as to what the jury should be told, inadequate instructions were given without proper objections. The inadequate instructions created the risk of unreliable determinations about whether death should be imposed. This presents grave concerns as to the reliability of the death sentences already imposed. Those facing capital trials now have room for hope that the sentencing decision will be an informed and reliable one, due to the new O.J.I. for capital cases. Those for whom change has come too late are still waiting for a thorough and reliable review in the Ohio courts.

E. *Denying Lesser Offense Instructions and Thereby Increasing the Risk of an Unwarranted Conviction on Aggravated Murder and/or the Capital Specifications*

The United States Supreme Court recognized in *Beck v. Alabama*[148] that failing to instruct on lesser offenses, when supported by the evidence, denies due process of law and results in cruel and unusual punishment because it yields unreliable decision-making. The Court understood that a jury might be unwilling to acquit an individual who had clearly committed some dastardly—though less than that charged—crime, and that without an option that actually fit the evidence, the jury was likely to enter an unwarranted conviction for the charged offense to avoid having the culprit walk free.[149] Ohio practices perpetuate the risk of unwarranted convictions of capital murder by failing to require lesser included offense instructions when they are warranted.

First, the Ohio Supreme Court unconstitutionally utilizes presumptions respecting both intent and purpose to kill as a device to claim there is no disputed issue of fact, and thus, that no lesser offenses are raised by the evidence.[150] By relieving the prosecution, through the use of these presumptions, of its duty to

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[147] *Id.* § 503.011(26) (Anderson 2000).

[148] 447 U.S. 625 (1980).

[149] *See id.*

[150] *See* State v. Williams, 660 N.E.2d 724, 730–31 (Ohio 1996); Ohio v. Clark, 527 N.E.2d 844 (Ohio 1988); State v. Thomas, 533 N.E.2d 286, 290 (Ohio 1988).

prove the actual fact in issue, the Ohio Supreme Court (and lower courts following its direction) denies the defendant the fundamental right to a jury determination of his guilt or innocence of the capital crime. When intent is at issue, even if a rebuttable presumption may be utilized, instructions on lesser included offenses with lower intent requirements should be given.

Second, the Ohio Supreme Court finds a failure to instruct on a lesser offense to be harmless when the evidence is sufficient to support a conviction on the greater offense.[151] However, sufficiency of the evidence does not make the instruction error harmless.[152] Substituting this standard of review for a proper jury instruction denies the accused a reliable jury determination of the essential elements of the crime.

Third, the court refuses to instruct on offenses raised by the evidence but not included within the indicted charge or specification when a verdict on the uncharged offense, rather than the indicted offense, would remove the case from death eligibility.[153] The court is wedded to what is in the indictment chosen by the prosecution, even though this might not fit all the evidence. Prosecution by way of an indictment is the defendant's right, and like any other right, is waivable. By requesting that the instruction on the related offense be given, the defense clearly seeks to waive that right in order to assure a more reliable verdict. Efforts to achieve more reliable verdicts are arbitrarily turned aside by the Ohio Supreme Court when it refuses to allow jury instructions under these circumstances.

F. *Burdening the Defendant's Effort to Defend Against the State's Charges*

1. *Limitations on the Use of Expert Testimony*

Ohio Supreme Court case law prevents a capital defendant from presenting expert testimony of his mental deficiency, mental illness, intoxication, and/or failure to form the purpose or intent to kill.[154] Evidence of such impairments can only be admitted if the impairment rises to the level of insanity. Thus, a capital defendant may be convicted of aggravated murder even though his or her functioning was significantly impaired due to mental illness, retardation, or intoxication. Persons with such deficiencies, for whom society cannot truly feel a

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[151] *See* State v. Benge, 661 N.E.2d 1019, 1024–25 (Ohio 1996).

[152] Kyles v. Whitley, 514 U.S. 419, 419 (1995); Yates v. Evatt, 500 U.S. 391, 391–92 (1991).

[153] *See* State v. Thompson, 514 N.E.2d 407, 417–19 (Ohio 1987) (rejecting the previous allowance of related offense instructions in State v. Rohdes, 492 N.E.2d 430 (Ohio 1986)); State v. Kidder, 513 N.E.2d 311 (Ohio 1987).

[154] *See* State v. Cooey, 544 N.E.2d 895, 913 (Ohio 1989) (intoxication); State v. Wilcox, 436 N.E.2d 523 (Ohio 1982) (mental deficiency or mental illness).

full retributive urge to punish, are sentenced to death by jurors who have not heard relevant testimony from experts on issues in dispute.

2. *A Narrowed Insanity Defense*

Further, Ohio's insanity defense has been significantly narrowed from the previous, and already rather narrow, *McNaghten* Rule to the more limited statutory requirement that "at the time of the commission of the offense, [the defendant] did not know, as a result of a severe mental disease or defect, the wrongfulness of his acts."[155] Thus, the ability to make out a defense of insanity is even more restricted than it was when the bar on expert testimony (discussed above) came into being. As a result, those suffering greater levels of impairment will be subject to conviction without an adequate opportunity to defend against or rebut the state's evidence.

3. *Incorrect Allocation of the Burden of Proof on Affirmative Defenses*

Respecting affirmative defenses in the form of excuse or justification (such as self-defense, defense of others, protection of property, prevention of a felony, or coercion), Ohio law increases the risk of mistaken conviction by demanding that the defendant prove the existence of the affirmative defense by a preponderance of the evidence.[156] Ohio is the only state in the country that places the burden of proving self-defense on the defendant; in every other state, the defendant will be acquitted unless the state proves the conduct unlawful (and not done in self-defense).[157] Ohio's practice on affirmative defenses invites mistaken convictions, for by it the defendant is disabled and unusually burdened in his efforts to respond to the state's case.

4. *A Lowered Standard of Proof for Conviction Based on Circumstantial Evidence*

Until the Ohio Supreme Court's decision in *State v. Jenks*,[158] an accused could not be convicted on circumstantial evidence alone unless that circumstantial evidence precluded all reasonable theories of innocence and juries were so instructed. The court not only changed that long-standing proof requirement, but made the change retroactive. In affirming one capital conviction, the court said, "It is no longer the standard, as it was when appellant's brief was filed [and necessarily when the case was tried], that circumstantial evidence must be

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[155] OHIO REV. CODE ANN. § 2901.01(N) (Anderson 2001) (enacted in 1991).

[156] OHIO REV. CODE ANN. § 2901.05(A) (Anderson 2001).

[157] John Quigley, *Ohio's Unique Rule on Burden of Persuasion for Self-Defense: Unraveling the Legislative and Judicial Tangle*, 20 U. TOL. L. REV. 105, 105 (1988).

[158] 574 N.E.2d 492 (Ohio 1991).

irreconcilable with any reasonable theory of innocence."[159] After reviewing the evidence in that case the court said, "While that evidence does not lead to a conclusion of [the defendant's] guilt to a degree of unquestionable certainty, it does withstand a sufficiency challenge."[160] The court found, in light of *Jenks* that, "an appellate court will reverse only if no 'reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.'"[161]

Recommendations

It is recommended that Ohio include irresistible impulse in its definition of insanity. Ohio should adopt the majority practice on affirmative defenses, such as self-defense, and require the state to prove that the conduct was illegal rather than require the defense to prove it was not.

Furthermore, the decision in *State v. Jenks* must not be applied retroactively and that all cases in which it was applied retroactively be reviewed to determine whether the conviction is valid under the law that existed at the time the case was tried. Additionally, it is recommended that pre-*Jenks* jury instructions on circumstantial evidence be restored, even if these instructions do not set the standard for appellate review of the sufficiency of the evidence.

Update

No progress has been made respecting the OSBA recommendations. The burden of proof on affirmative defenses still lies with the accused. Convictions based on circumstantial evidence that fails to exclude all reasonable theories of innocence are allowed. The Ohio Supreme Court's rejection of residual doubt as a mitigating factor has exacerbated the negative impact of these rulings. Prior Ohio case law allowed the trial jury, judge, and reviewing judges to consider lingering doubt about guilt in favor of a life sentence.[162]

Jury studies around the country confirm that more life sentences are rendered due to doubt about guilt than for any other reason. Lingering doubt is "fundamental to [jurors'] responsibility as moral agents" and is consistently "the strongest of the mitigating considerations that figure in the final punishment decisions of capital jurors."[163] Yet, the Ohio Supreme Court held that lingering doubts about guilt are irrelevant to the capital sentencing decision and cannot be

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[159] State v. Grant, 620 N.E.2d 50, 64–65 (Ohio 1993).

[160] *Id.*

[161] *Id.*

[162] *See* State v. Watson, 572 N.E.2d 97, 110–11 (Ohio 1991).

[163] William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decisionmaking*, 83 CORNELL L. REV. 1476, 1544 (1998).

considered or instructed upon in Ohio sentencing proceedings.[164] In so doing, the Court increased the risk of executing an innocent person. This holding, coupled with the *Jenks* decision, makes executing the innocent likely where the evidence of guilt is circumstantial. Given the risks that were already present in Ohio, this decision is both regrettable and unacceptable.[165]

Ohio has systematically narrowed the definition of legal insanity to the point where the seriously mentally ill are held criminally responsible in circumstances where other jurisdictions, and even Ohio in the past, would have recognized the mental illness as an insanity defense. The definitions of the culpable mental states required for conviction of aggravated murder—purposely, specific intent to kill, and prior calculation and design—have been substantially eroded by judicial decision. As a result, the seriously mentally ill, who might otherwise have been found insane or found not to have formed the culpable mental state for aggravated murder and thus have been convicted of a lesser charge, are not only subject to conviction for aggravated murder, but are also eligible for the death penalty.

Ohio's first two post-*Furman* executions were of seriously mentally ill prisoners. On February 19, 1999, Wilford Berry, who suffered from schizophrenia, was executed. Mr. Berry sought his own execution from the beginning of the proceedings against him. He made his confession to arresting officers contingent upon the agreement that he would receive a death sentence.[166]

On June 14, 2001, the State of Ohio executed Jay D. Scott. Mr. Scott was diagnosed with schizophrenia,[167] and suffered delusions and paranoia. Within the months preceding his execution, he believed that the prison guards were holding his family hostage and that he was required to jump around his cell in order to keep them from being tortured.

These cases raise a new question in light of the stringent definition of insanity and expanded concepts of culpable mental states recognized in Ohio law. Even if the seriously mentally ill should be held criminally responsible for their acts, do they possess the degree of control and culpability that justifies imposition of the death penalty?[168]

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[164] State v. McGuire, 686 N.E.2d 1112, 1123 (Ohio 1997).

[165] *See* Margery Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. L. REV. 41 n.171 (2001) (critiquing *State v. McGuire* and discussing jury studies and practices respecting lingering doubt).

[166] State v. Berry, 686 N.E.2d 1097, 1103–04 (Ohio 1997).

[167] State v. Scott, 748 N.E.2d 11, 13 (Ohio 2001).

[168] *See generally Scott*, 748 N.E.2d at 19–20 (Ohio 2001) (Pfeifer, J., dissenting); Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment In Death Penalty Cases*, 66 FORDHAM L. REV. 21 (1997).

V. A SEPARATE BUT UNEQUAL SYSTEM FOR CAPITAL APPEALS DOES NOT DO JUSTICE

In 1995, Ohio created a separate appellate process for those convicted of capital crimes and sentenced to death.[169] Death penalty cases are no longer appealed to the court of appeals of the county in which the case was tried, but instead are appealed directly to the Ohio Supreme Court. All other criminal cases have an appeal of right to the county court of appeals and the right to ask for discretionary review by the Ohio Supreme Court.

This change in the law has raised a number of questions. Is a direct appeal to the Ohio Supreme Court equal to or better than the two-step process available to all other criminal defendants? Is it equal to or better than the statutorily mandated review by both the court of appeals and the Ohio Supreme Court which was in effect until January 1, 1995? Is it less than the guaranteed court of appeals review and discretionary Ohio Supreme Court review provided in all other criminal cases? Has this process eliminated all vestiges of proportionality review?

Recommendation

It is recommended that the Ohio State Bar Association (OSBA) form a committee to study the impact of eliminating county court of appeals review in capital cases and that the committee issue a report with its findings to the General Assembly no later than September 1999.

Update

Although the OSBA declined to conduct the proposed study, the need for such a study is now apparent. The impact of eliminating the first appeal of capital cases to the county court of appeals is being felt throughout the legal system. Attorney General Betty Montgomery has criticized the Ohio Supreme Court for failing to handle the cases fast enough.[170] Chief Justice Thomas Moyer of the Ohio Supreme Court noted in response that it was understood that appellate review "would be extensive and time-consuming following voters' adoption of the constitutional amendment providing for direct appeal of capital cases to the [Ohio] Supreme Court."[171] The Chief Justice said, "The review must be absolutely meticulous since only one comprehensive appellate review exists in

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[169] OHIO CONST. art. IV, §§ 2(B)(2)(c), 3(B)(2).

[170] OHIO ATT'Y GEN., THE ATTORNEY GENERAL'S REPORT ON DEATH PENALTY APPEALS (2000), *at* http:// www.ag.state.oh.us/capcrime/2000Report.pdf.

[171] Press Release, Supreme Court of Ohio, Moyer pledges continued thorough review of death cases (Apr. 2, 2001), *at* http://www.sconet.state.oh.us/communications_office/press_releases/2001/0402review.asp.

Ohio as a matter of right." [172] Eliminating the first level of appellate review has eliminated the safeguard of tiered review and increased the burdens on the state's highest court. The effect of these changes on the cases themselves is yet to be evaluated.

VI. STATE POST-CONVICTION REMEDIES ARE UNAVAILABLE AND/OR INADEQUATE

Post-conviction review under Ohio Revised Code section 2953.21 provides the only remedy for errors that occur in the trial or preparation of a capital case but that do not appear on the appellate record. Prior to the recent changes in Ohio's post-conviction law, the Sixth Circuit had declared Ohio post-conviction remedies to be "often unavailable or ineffective."[173] Recent changes have made that remedy even less meaningful to those facing execution.

A. *Capital Post-Conviction Petitioners Are Not Provided Meaningful Legal Representation*

1. *Adequately Compensated, Court-Appointed, Post-Conviction Counsel Are Not Provided to Indigent Capital Defendants*

Ohio Revised Code section 2953.21(I)(1), which became effective on October 16, 1996, requires that post-conviction counsel be appointed for indigent capital defendants upon request. [There is no similar provision for non-capital cases.] While this new requirement is a step in the right direction, the legislature provided no money for the appointment of counsel in these cases. Instead it is left up to each county to determine what a capital post-conviction defense is worth. Some pay as little as $150.[174] Others pay considerably more. None provide an amount that is realistically adequate for a capital post-conviction defense.

Preparing a capital post-conviction case requires all the work that is done in preparing for trial plus review of the trial record and investigation of all that was done in preparation for the trial. It requires greater expertise than does trial work in certain areas of law such as preserving issues for subsequent review in the federal courts, res judicata as a procedural bar, and investigation of ineffective assistance of counsel claims.

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[172] *Id.*

[173] Keener v. Ridenour, 594 F.2d 581, 590 (6th Cir. 1979).

[174] *See* OFFICE OF THE OHIO PUBLIC DEFENDER, *supra* note 45.

Recommendation

It is recommended that a statewide fee schedule for the appointment of post-conviction counsel be adopted. Post-conviction counsel should be paid at the same hourly rate as is trial counsel. Additionally, it is recommended that the post-conviction budget equal the trial budget and that the court have authority to use more money if the circumstances of the case require it.

Update

The Ohio Public Defender Commission revised its reimbursement schedules for appointed counsel in post-conviction capital cases to allow a maximum hourly rate of $50 for out-of-court time and $60 for in-court time with a total fee maximum of $12,500.[175] Even so, many counties do not authorize payment of fees at these rates but continue to set lower hourly rates for capital post-conviction counsel.

2. *There Are No Training or Educational Standards for Appointed Counsel in Capital Post-Conviction Cases*

Rule 20 of the Rules of Superintendence for Courts of Common Pleas, which sets out training and educational standards for appointed counsel in death penalty cases, has no provision for certifying capital post-conviction counsel. Even so, Ohio Revised Code section 2953.21(I)(2) requires that any counsel appointed in a capital post-conviction case be rule-certified. This statute was enacted in an effort to make Ohio meet the standards for the "opt in" provisions of the new federal habeas corpus act.[176] Rule 20 applies only to trial and appellate counsel. It has no training or certification requirements for post-conviction representation. Any rule-certified attorney who is appointed under present certification standards will be certified as trial lead counsel or co-counsel, or as appellate counsel. While understanding trial and appellate aspects of capital litigation is important for post-conviction counsel, that alone does not prepare an attorney to handle a capital post-conviction case.

Post-conviction proceedings are considered civil although they are often referred to as quasi-criminal. The civil rules apply to the extent that they do not conflict with the specific provisions of the post-conviction statute. Doctrines of waiver, procedural default, harmless error, and res judicata must be evaluated in presenting every post-conviction issue. Counsel must work with one eye on past proceedings, two hands on the present litigation, and one eye on possible future

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[175] OHIO PUBLIC DEFENDER, *supra* note 46, at 15.

[176] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2261(c) (2000).

proceedings. Understanding federal habeas corpus proceedings is essential. Specialized training for appointed counsel is critical if state post-conviction remedies are to be meaningful.

Recommendation

It is recommended that specialized training in capital post-conviction litigation be required for appointed counsel.

Update

The United States District Courts in Ohio have held that Ohio's past practice for providing counsel in capital post-conviction proceedings does not meet the standards for "opt-in" status under the AEDPA.[177] No cases have yet reached the court wherein counsel were appointed under Ohio Rev. Code section 2953.21. No training requirements for capital post-conviction counsel have been adopted under Supreme Court Rule of Superintendence 20.

3. *There Are No Standards For Appointing Counsel When Claims of Ineffective Assistance of Appellate Counsel Must Be Raised*

Ineffective assistance of appellate counsel claims may not be raised as part of a post-conviction petition. These claims must be filed in a separate proceeding.[178] The law makes no provision for providing counsel to indigent capital defendants who must raise claims of ineffective assistance of appellate counsel. It is unclear upon whom this obligation falls. In the past, when the appeal preceded post-conviction litigation, the natural order of the process dictated that post-conviction counsel would be the one to find any failures of appellate representation. This is no longer true. It is entirely possible that the appellate brief may not be complete by the time the post-conviction petition is filed. Capital defendants are ill equipped to assess the quality of their appellate representation. This gap in representation must be filled.

Recommendation

It is recommended that counsel be appointed following direct appellate review to determine whether effective assistance of appellate counsel was provided.

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[177] Mills v. Anderson, 961 F. Supp. 198, 200–01 (S.D. Ohio 1997); Scott v. Anderson, 958 F. Supp. 330, 332 (N.D. Ohio 1997); Hambrin v. Anderson, 947 F. Supp. 1179, 1181 (N.D. Ohio 1996); Zuern v. Tate, 938 F. Supp. 468, 470–72 (S.D. Ohio 1996).

[178] *See* State v. Murnahan, 584 N.E.2d 1204, 1204–05 (Ohio 1992).

Update

The Sixth Circuit has ruled that defendants seeking to reopen their appeals on grounds that their appellate counsel had provided ineffective assistance are entitled to effective assistance of counsel in the reopening effort.[179] This ruling supports the OSBA recommendation that counsel be appointed at this stage of the proceeding.

B. *Reasonable Access to An Accurate Record Is Denied*

1. *The Indigent Capital Defendant Is Not Provided a Copy of the Transcript For Post-Conviction Purposes*

Neither the appellate rules nor the Ohio Supreme Court Rules of Practice provide for a free copy of the record for use by post-conviction counsel representing an indigent client in capital or non-capital cases. It is impossible to file a post-conviction petition without a copy of the record. The record determines to a large extent what can and cannot be raised in a post-conviction proceeding. In the past, appellate counsel simply transferred the record to post-conviction counsel when the appellate process was complete. Under current law, the post-conviction petition must be filed 180 days after the record on appeal is filed in the court of appeals or the Ohio Supreme Court.[180] Appellate counsel prepares the brief on appeal at the same time that post-conviction counsel determines what can and cannot be raised. Neither appellate nor post-conviction counsel can afford to be without the record during this critical time. Affording a right to post-conviction review, even with the appointment of counsel, is meaningless when counsel is not provided a copy of the record.

Recommendation

It is recommended that the indigent defendant be provided, at state expense, a copy of the record for post-conviction review.

2. *The Law Provides No Method By Which Post-Conviction Counsel Can Ensure That He or She Is Provided a Complete and Accurate Record*

a. *Courts of Appeals*

Under current law, the time for filing both the brief on appeal and the post-conviction petition in capital cases where the offense was committed before

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[179] *See* White v. Schotten, 201 F.3d 743 (6th Cir. 2000).

[180] OHIO REV. CODE ANN. § 2953.21(A)(2) (Anderson 2001).

January 1, 1995, and all non-capital criminal cases, is triggered by the filing of the record in the court of appeals.[181]

The transcript is initially filed with the clerk of the trial court.[182] It is then sent to the court of appeals and filed there.[183] When an incomplete, improperly prepared, or inaccurate record is accepted for filing, it creates many problems for all those who must rely on it. Appellate counsel can correct the record and is obligated to do so under Appellate Rule 9. Post-conviction counsel, however, is without standing to do so.

This situation forces post-conviction counsel to proceed with an inadequate record when corrections could and should be made. The deadline for filing the post-conviction petition is set by statute and cannot be extended. The appellate briefing schedule can and often is extended. In complex or voluminous cases, it is often extended six months or more. In that circumstance, it is possible that appellate counsel will not discover problems with the record until after the post-conviction petition has been filed.

b. *The Ohio Supreme Court*

Filing of the appellate record in capital cases arising after January 1, 1995, will take place in the Ohio Supreme Court. Supreme Court Rule of Practice XIX, section 3(D) requires that record questions, concerning whether the record "truly discloses what occurred at trial," be resolved in the trial court. The Ohio Supreme Court will address questions as to "form and content."[184] Once again, the responsibility for ordering and assisting the clerk to assemble the record lies with appellate counsel.[185]

The original record is to be transmitted to the Supreme Court by the clerk of the court of common pleas.[186] A copy is to be retained by the trial court for use in post-conviction cases.[187] There are no provisions for allowing post-conviction counsel to participate in the record correction process.

Recommendation

It is recommended that post-conviction counsel be given standing to participate in the record correction process.

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[181] *Id.* Ohio Revised Code section 2953.21(A)(2) uses the word "transcript." *Id.* The transcript is routinely filed as part of the record. OHIO APP. R. 11(B), 18(A).

[182] OHIO APP. R. 10(B)(1).

[183] OHIO APP. R. 11(B).

[184] OHIO SUP. CT. R. PRAC. XIX § 3(D).

[185] *Id.* XIX §§ 3(B)(2), 4(A)(2).

[186] *Id.* XIX § 4(B).

[187] *Id.* XIX § 4(D).

3. *The Law Does Not Provide Adequate Time for Preparation of the Post-Conviction Case*

No extensions of the filing deadline are available in post-conviction cases. Ohio Revised Code section 2953.21 is in essence a statute of limitations. The courts are without power to extend the deadline. This is an inconvenience in the best of situations and a denial of justice in the worst. Records in capital cases are often lengthy—frequently in excess of 5,000 pages. Assuming one reading to be adequate and assuming a reading speed with detailed note taking of forty-five pages per hour, it would take counsel over 110 hours to review such a record. Also required would be at least two meetings with the client, an interview with trial counsel, and a meeting with appellate counsel. This is the preliminary work that must be done in order to begin the post-conviction investigation. If this work began on the first day the record was filed, assuming that a copy was available to post-conviction counsel that day and assuming that counsel had no other cases, this would take every work hour of a full month.

Following this process should be interviews with investigating officers, trial personnel, family members, and witnesses—called and uncalled at trial. There may be a need for psychological evaluation of the client. There may be a need for DNA or other scientific testing. The intricacy of the investigation is dictated by the circumstances of each case. Motions for funds to hire experts will have to be filed and ruled on. Assuming great efficiency on the part of both counsel and court, assuming immediate availability of experts and immediate turn around on their work, this process will take two to three more months. The investigation could reveal that there is more to do. Additionally, the client must be consulted.

Once the investigation is complete, the research and drafting must be done, affidavits and documentary evidence must be obtained, and the petition must be filed. Counsel who does nothing else might be able to meet the 180-day deadline—but many will not be able to do so. Because no extensions of the deadline for filing a post-conviction petition are allowed, counsel's preparation, investigation, client involvement, and research will be sacrificed. Even if Ohio adequately provided, trained, and compensated counsel to indigent capital defendants, those lawyers could not provide minimally competent representation in the short time allowed for filing the post-conviction petition. Ohio's post-conviction "remedy" is no remedy at all for capital defendants.

Recommendation

It is recommended that Ohio Revised Code section 2953.21 be amended to allow reasonable extensions of time for the filing of post-conviction petitions when good cause for the extension is demonstrated.

Update

DNA testing is now available under extremely limited circumstances to death row prisoners whose cases are in post-conviction proceedings.[188] Only if the death row inmate is willing to make the results public, have the test done by a state facility chosen by either the Attorney General or the prosecuting attorney in his case, and have the results used against him if they fail to exclude him as a possible perpetrator, will the test be provided. Even so, it is arguably better to have this limited availability rather than none at all. There has been no change in the time constraints within which post-conviction petitions must be filed.

VII. STAYS OF EXECUTION ARE NOT REASONABLY OR PREDICTABLY AVAILABLE TO CAPITAL DEFENDANTS

Once again Ohio has created a "separate" system for capital cases. While courts of common pleas and appeals retain jurisdiction to stay the execution of sentence in all other post-conviction proceedings, they are now denied that jurisdiction in capital cases once the Ohio Supreme Court has set an execution date.[189] The amendments to these statutes, made in 1995 and 1996, change the long standing rule of law that a court has jurisdiction to issue orders necessary to effectuate its authority over a matter before it. Now, once the Ohio Supreme Court has scheduled an execution date, a court of common pleas or court of appeals, that believes, based on the pleadings before it, that a conviction or death sentence is void or voidable, will be unable to stop the execution, thus making its jurisdiction over the subject matter of the case meaningless.

Under the new law, courts of common pleas may grant a stay of execution in a capital post-conviction case *after* the petition is filed *if* the Ohio Supreme Court has not set an execution date.[190] Courts of appeals have no statutory authority to grant a stay of execution in post-conviction cases [or any others] in which a death sentence was rendered for a crime committed on or after January 1, 1995, or in which the Ohio Supreme Court has set an execution date.[191]

The Ohio Supreme Court, in *State v. Steffen*,[192] determined that Ohio Revised Code section 2953.21(H) gives it sole state-authority to grant stays of execution in a capital post-conviction case once it has set an execution date in that case. The Court will grant a six-month stay in order for the post- conviction petition to be prepared.[193] Once the post-conviction petition is filed, the Ohio Supreme Court

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[188] OHIO ATT'Y GEN., REPORT ON CAPITAL JUSTICE INITIATIVE: PROTOCOL FOR POST-CONVICTION DNA TEST (2001), *at* http://www.ag.state.oh.us/capcrime.html.

[189] OHIO REV. CODE ANN. §§ 2953.09–.10, .21(H) (Anderson 2001).

[190] OHIO REV. CODE ANN. § 2953.21(H) (Anderson 2001).

[191] OHIO REV. CODE ANN. § 2953.09 (Anderson 2001).

[192] 639 N.E.2d 67, 76 (Ohio 1994).

[193] State v. Glenn, 514 N.E.2d 869, 869 (Ohio 1987).

will grant a stay that allows the client to exhaust post-conviction remedies, including state appeals.[194]

The impact of this change in the jurisdiction to grant stays will be most severely felt when a capital prisoner brings an action based on a claim of actual innocence under Ohio Revised Code section 2953.23. Those claims are raised in either successive post-conviction petitions or petitions filed after the 180 day deadline. In nearly every such case, the Ohio Supreme Court will have reviewed the direct appeal and set an execution date. That means that the trial court or court of appeals, which actually has the new information in front of it, may decide that the claim is valid and requires a hearing or that the execution should not go forward, but will be unable to stay the execution. If there is time to get the new information to the Ohio Supreme Court, and if it agrees with the lower court, a stay may be obtained. If not, the execution of a possibly innocent person will go forward because the statute does not allow the court reviewing the matter to effectuate its jurisdiction.

The same problems could arise in trial and appellate courts in initial post-conviction review. The only guarantee that a stay will be granted is the Ohio Supreme Court's opinion in *State v. Glenn*. However, the Ohio Supreme Court's opinion in *Glenn* could be changed at any time. That would leave the trial court and the court of appeals without the authority to grant a stay in the case before them and the accused with little or no time to pursue post-conviction remedies.

This system of granting stays invites arbitrariness and error. If left as is, it will result in the execution of prisoners who have not fairly exhausted all legitimate avenues of relief.

Recommendation

It is recommended that Ohio Revised Code sections 2953.09–.10 and 2953.21(H) be amended to return to the court having jurisdiction of the subject matter of a capital case the jurisdiction to determine when and whether to grant a stay of execution.

Update

Recently, in the Jay D. Scott case, Ohio had its first experience with the rule that prohibits the court with subject matter jurisdiction of a capital case from issuing a stay in order to effectively exercise that jurisdiction. Mr. Scott's competence to be executed was at issue. Scott suffered from schizophrenia and had recently been examined by a psychiatrist who said he exhibited a number of

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[194] *Id.*

effects from that illness, including possible bodily hallucinations and reduced mental capacity, causing him to function as if mentally retarded.[195]

The case was filed in the Eighth District Court of Appeals in the late afternoon on April 16, 2001, only moments after relief was denied by the Cuyahoga County Court of Common Pleas.[196] Execution was scheduled for 9:00 p.m. on April 17, 2001. Arguments were held in the court of appeals at 5:00 p.m. that day.[197] At approximately 6:45 p.m., the court of appeals judges determined that they required more time for review of the issues.[198] Unable to grant a stay of execution upon its own authority, the court of appeals applied to the Ohio Supreme Court for a stay to allow it time to address the important issues in Mr. Scott's case. The Ohio Supreme Court issued the stay approximately sixty-five minutes before the execution was to take place[199] and limited the time that would be allowed for the court of appeals to reach a decision to three days.[200]

This event illustrates the many problems with the statutory bar to allowing the court that has subject matter jurisdiction of the case the authority to grant a stay in order to effectuate its jurisdiction. First, the new process lengthens the time required to obtain a stay in situations where time is of the essence. Second, it invites the tragedy of a stay being granted too late. Third, it creates the unseemly and almost certainly unconstitutional situation of a court, whose jurisdiction of the subject matter is set by the people of Ohio in their constitution, going to another court for permission to exercise that jurisdiction. This is particularly egregious where, as in Jay D. Scott's case, his present competence to be executed was at issue, and the subject matter of the case had never before been viewed by the Ohio Supreme Court. Fourth, it invites bitterness and hostility within the judiciary. The circumstances in which one court orders another to act within a limited amount of time should be only the most extraordinary. Competency to be executed is an issue in many death penalty cases and such proceedings are not extraordinary. Furthermore, the denial of a stay in such a situation would be an affront not just to the court asking for it, but also to the justice system as a whole. The OSBA recommendation should be immediately adopted.

CONCLUSION

Ohio's death sentencing system results in unreliable capital convictions and sentences. It is clear that neither the courts nor the legislature have found it satisfactory, for it is subject to constant tinkering by both the legislative and

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[195] Tr. of Proceedings at 10, 19, 48–49, State v. Scott, No. CR 18252 (Ohio C.P. Cuyahoga County filed Apr. 16, 2001).

[196] State v. Scott, No. CR 182521 (Ohio C. P. Cuyahoga County filed Apr. 16, 2001).

[197] Joe Hallett et al., *Execution Halted*, COLUMBUS DISPATCH (Ohio), Apr. 18, 2001, at A1.

[198] *Id.*

[199] *Id.*

[200] State v. Scott, 476 N.E.2d 1124, 1124 (Ohio 2001).

judicial branches. In every major phase of the process—trial, post-conviction, appeal, the jurisdiction to grant stays, and requirements for appointment of counsel—confusing, harmful, and sometimes well intended changes have been made. It cannot fairly be said that those sentenced in the first years after enactment of Ohio's death penalty law were subject to the same sentencing standards as are now in effect.

Denial of meaningful assistance of counsel, under funding the defense, arbitrary influences on decision making, and separate systems of appeal and granting stays make Ohio's capital sentencing system unreliable, unpredictable and unfair. No individual should be executed unless and until it is determined that none of the factors identified in this report has undermined the reliability of his capital sentence. Steps should be taken by Ohio's courts, legislature, and governor, to insure that all of these safeguards are in place and observed in every case.[201]

EPILOGUE

Many of the recommendations of the OSBA have not yet been implemented. Some positive steps, however, have been taken. Improvements in the Ohio Jury Instructions for capital cases increase the likelihood of properly guided jury deliberations. Although this report notes mainly those efforts at change that have come to fruition, a number of attempts to correct the unreliability in capital cases have been made. Representative Shirley Smith introduced legislation calling for a moratorium.[202] Senator Mark Mallory sponsored a bill to require proof of guilt beyond all doubt before a death sentence could be imposed.[203]

The Ohio State University Michael E. Moritz College of Law sponsored this symposium on statutory reform with the goal of inspiring changes that will enhance the fairness and reliability of Ohio's death penalty system. Public support for the death penalty as it is presently used has dropped below seventy percent.[204] Concern over the execution of the innocent and the mentally ill is rising.[205]

Every small step in recognizing and eliminating unfair or unreliable practices in the use of capital punishment is like a drop of water in a bucket. It may seem

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[201] The recommendations adopted by the OSBA from this report appear in summary form in a report titled "*Summary of the Ohio State Bar Association Report Calling for Review of Ohio's Death Penalty System in Order to Remedy Defects in the Existing Law that Undermine the Fairness and Reliability of Capital Prosecutions and Sentences in Ohio.*" (on file with author).

[202] H.B. 733, 123rd Gen. Assem., Reg. Sess. (Ohio 1999–2000).

[203] S.B. 335, 123rd Gen. Assem., Reg. Sess. (Ohio 1999–2000). A new version introduced by Rep. Peter Lawson Jones is pending. H.B. 101, 124th Gen Assem., Reg. Sess. (Ohio 2001).

[204] Jeffrey M. Jones, *Two-Thirds of Americans Support the Death Penalty*, Gallup News Service (March 2, 2001), *at* http://www.gallup.com/poll/releases/pr010302.asp.

[205] James S. Liebman et al., *A Broken System: Error Rates In Capital Cases 1973–1995*, 78 TEXAS L. REV. 1839, 1839–45 (2000).

insignificant at the moment, but over time the bucket will fill and overflow and wash away the iniquity and inequity of a system that no longer serves the public good. Whether that results in a new death penalty system or new concept of justice remains to be seen.